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CASE AND COMMENT

NATIONALITY—INTERPRETATION OF STATUTE

IN the proceedings in *Att.-Gen. v. Prince Ernest Augustus of Hanover* in the House of Lords [1957] 2 W.L.R. 1, it did not, apparently, emerge whether or not the consent of the Sovereign under the Great Seal had been given to the marriages of ancestors of the respondent less remote than King George V of Hanover, the second Duke of Cumberland of the latest creation. The question whether the claim of the respondent to be a British subject by virtue of the purported naturalisation of all descendants of the Electress Sophia by the statute 4 & 5 Ann. c. 16 (otherwise known as 4 Ann. c. 4) might possibly be invalidated as a result of the operation of the Royal Marriages Act, 1772, was thus not discussed at all. The Attorney-General likewise failed to press the question whether the Act of Anne, having been passed before the Act of Union, could operate to confer the status of a British—as distinct from an English—subject upon a person born after the formation of the United Kingdom. Both these questions, which were discussed by, amongst others, the writer of this note in comments upon the decisions of the lower courts ([1955] C.L.J. 142; (1956) 5 I.C.L.Q. 61) therefore remain unresolved. For the rest, upon an appeal from a unanimous Court of Appeal, an appeal in which, incidentally, the costs of both sides were borne by the Crown, a unanimous House of Lords has confirmed that the words “. . . the Princess Sophia . . . and the Issue of Her Body, and all Persons lineally descending from Her, born or hereafter to be born, be . . . deemed . . . natural-born Subjects of the Kingdom” mean exactly what they appear to mean, notwithstanding that the preamble to the statute in which they are contained might suggest

that the Parliament of 1705 had a more limited intent or that the passage of time has rendered the expressed intent of that Parliament somewhat absurd.

The House of Lords added little to what the Court of Appeal had said concerning the words actually in issue. But their Lordships' speeches contain several remarks of general interest upon statutory interpretation, in the practice of which, as the Lord Chancellor observed "a large and ever-increasing amount of the time of the courts has, during the past three hundred years, been spent" ([1957] 2 W.L.R. 1, at p. 8). The Attorney-General's attempt to limit the enacting words by reference to the preamble had been "met by the bald general proposition that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble." From this Viscount Simonds felt he must dissent "if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context . . . including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia*, and the mischief . . . the statute was intended to remedy . . ." discovered "by those and other legitimate means" (at p. 7). Lord Normand similarly observed that "no part of a statute can be regarded as independent of the rest" and that "in order to discover the intention of Parliament it is proper that the court shall read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light on its meaning, and of the factual context, such as the mischief to be remedied, and those circumstances which Parliament had in view . . ." (at pp. 11, 13). And Lord Somervell likewise said that "it is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and general scope of the Act constitute the background of the contest" (at p. 18). These observations no doubt reduce to its proper proportions the so-called rule in *Powell v. Kempton Park Racecourse Co.* [1899] A.C. 143, that a preamble cannot be used to control a statute expressed in unambiguous terms. "The word 'unambiguous,'" to quote Lord Somervell once more, "must mean unambiguous in their context" (at p. 18) and the "context" is taken to be the "legal and factual context" in the round. But it may, with respect, be doubted whether the art of statutory interpretation is much advanced by anything positive which was said by any of the nine judges before whom the instant case came

at its different stages. For, as the Lord Chancellor remarked, "it is natural enough that in a matter [as] complex [as] the interpretation and exposition of statutes the guiding principles should be stated in different language and with such varying emphasis on different aspects of the problem that support of high authority may be found for general and apparently irreconcilable propositions" (at p. 8).

CLIVE PARRY.

INTERNATIONAL LAW—SOVEREIGN IMMUNITY—
CHOSES-IN-ACTION—EFFECT OF CLAIM OF CONTROL

THE rule that a foreign sovereign is not subject to the jurisdiction of the English courts has commonly been stated in the form of two propositions: the first is that he may not directly, without his consent, be made a party to legal proceedings; the second is that proceedings must be stayed which, though they do not name him directly as a party, nevertheless aim at depriving him of property of which he is the owner or of which he is in possession or control. Hitherto, the implications of the second proposition have been worked out in relation to property of a tangible character. Now, for the first time, in *Nizam of Hyderabad v. Jung* [1957] 2 W.L.R. 217, reversing the decision of Upjohn J. [1956] 3 W.L.R. 667, the Court of Appeal has been called upon to consider in detail the effect of a plea of immunity in relation to proceedings involving a chose-in-action—in this case, a debt of about one million pounds.

The case arose in the following circumstances. In September, 1948, just before the invasion of Hyderabad by India, Mir Jung, the Agent-General of Hyderabad in London, called upon Mr. Rahimtoola, the High Commissioner of Pakistan in London, and requested him to accept a transfer of £1,007,940 consisting of funds which Mir Jung was then holding on behalf of the Government of Hyderabad. On the express instructions of the Foreign Minister of Pakistan, Mr. Rahimtoola accepted the transfer and, in due course, the money was placed to the credit of an account at the Westminster Bank entitled "Mr. Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London)." In 1954 the Government of Hyderabad called on Mr. Rahimtoola to return the money. Their demand was refused; in 1955 they instituted proceedings against three defendants, of whom Mr. Rahimtoola was one, and the Westminster Bank was another. Mr. Rahimtoola then moved to set aside the writ in the action on the ground that it impleaded the Government of Pakistan or, alternatively, sought to interfere

with the right or interest of such Government in the credit standing at the Westminster Bank.

Since the Government of Pakistan were not named as defendants, the issue raised by this plea was whether they were, nevertheless, indirectly impleaded as being the owners, or in possession or control, of the debt from the Bank to Mr. Rahimtoola. Since the debt had not been vested in "The Government of Pakistan" *eo nomine* and since that Government did not claim any beneficial interest in the moneys, the only real issue in connection with the ownership of the debt was whether the legal title of Mr. Rahimtoola could for this purpose be deemed to be the title of Pakistan. In other words, did the establishment of an account in the name of Mr. Rahimtoola as "High Commissioner of Pakistan" vest the debt directly in the Government of Pakistan? Upjohn J., in the court below, appeared to give an affirmative answer to this question, saying that he did not think he "ought to draw narrow distinctions between title to a debt in the name of the sovereign or his servant" ([1956] 3 W.L.R. at p. 676). The Court of Appeal, however, returned a negative answer, stating that the transfer to Mr. Rahimtoola "by virtue of his office as High Commissioner cannot be treated . . . as a transfer to one of the principal officers of State which would so identify its holder with the State itself as to have made the vesting equivalent for all relevant purposes to a vesting in the State" ([1957] 2 W.L.R. at p. 233).

As to the possibility that the debt was in the possession of the Government of Pakistan, the Court of Appeal held that there could not, even for purposes of State immunity, be "possession" of a debt. It is of the very nature of a chose-in-action, as opposed to a chose-in-possession, that it is not susceptible of "possession" in the ordinary sense of the word.

There remained, then, only the relationship of "control" as a basis for the claim of Pakistan. And in the same way as in the *Dollfus Mieg* case ([1952] A.C. 582) it had been held that a State could have sufficient control of chattels through its agent to render an action against the agent for the recovery of the chattels an impleading of the State, so it was argued on behalf of the Government of Pakistan that this debt in the hands of Mr. Rahimtoola was subject to their control. However, this argument was rejected by the Court of Appeal on the basis of additional evidence admitted in the course of the appeal. This evidence established that the transfer to Mr. Rahimtoola by Mir Jung in 1948 was made in breach of the duty of the latter and without any authority from the Nizam. The Court of Appeal considered, in these circumstances,

that any control which the Government of Pakistan might have had, in the form of a legal right to call upon Mr. Rahimtoola for the payment over to them of the moneys, was subject to the rule of English law that, if it appears that a transfer was made by a third party to an agent under a mistake of fact or in consequence of some wrongful act, the transferor is entitled to recover the money directly from the agent so long as the agent has not yet in fact accounted to his principal. In the circumstances, it was held that the payment to Mr. Rahimtoola was made in error and that he had not accounted to his principals (the Government of Pakistan) by the time when, in 1954, the transferors in error, namely, the Government of Hyderabad, called upon him to return the money. As from the moment when the Government of Hyderabad asserted their right to recover the money, the legal right of the Government of Pakistan to call for payment from Mr. Rahimtoola terminated and, with it, terminated their "control."

The case having been decided on these grounds, the valuable observations made by the Court of Appeal on the rules of sovereign immunity in relation to trust property are, strictly speaking, *obiter*. Nevertheless, it may be helpful to record the view—expressed in both judgments of the Court—that while English courts will not be deterred from exercising their equitable jurisdiction to administer trust property in which a foreign sovereign has, or claims to have, a beneficial interest, they will not exercise such jurisdiction in cases where the foreign sovereign is the trustee or where the trust property is in his hands.

There will, it is believed, be little disposition to disagree with the conclusions of the court on this last point or, indeed, with their view that if the mantle of immunity is to be cast over a chose-in-action, it is necessary for the foreign State to show that title to or control of the debt lies in it. But there may be some ground for hesitation in accepting the significant and vital distinction drawn by Lord Evershed M.R., without discussion and without citation of authority, between "principal officers of State" and other officers. The Master of the Rolls acknowledged, in effect, that there are circumstances in which title to a debt could be held to be vested directly in a foreign State if the debt were nominally due to a sufficiently high or "principal" officer of that State. At the same time, he held that these circumstances did not exist in the present case. His conclusions, when compared with those reached by another division of the Court of Appeal some weeks earlier in *Baccus S.R.L. v. Servicio Nacional del Trigo* [1956] 3 W.L.R. 948, thus appear to leave the law concerning the identification of foreign States with their officers for purposes of immunity

in the following position: As a result of the latter case, the National Wheat Service of Spain, although under Spanish law a corporate body and a legal entity distinct from the State, is considered to be so closely identified with the State of Spain that an action against the Wheat Service is treated as an action against the State. In the present case, a person who was at the material date the High Commissioner of Pakistan and who, as a natural person, was also an entity distinct from the State he represented, is held, even though acting on the directions of his Foreign Secretary, to be not so closely identified with the State of Pakistan that an action against him may be considered to be an action against Pakistan. Despite the differences between the conclusions in the two cases, there may be some who experience difficulty in discerning the operative distinctions between them. In the law of State responsibility, a line is occasionally drawn, in connection with the requirement of the exhaustion of local remedies, between the acts of the highest officials of the Government and other officials. It is not clear to what extent that distinction, assuming it to be valid, applies to circumstances such as those underlying the one drawn in the present case.

E. LAUTERPACHT.

ADMINISTRATIVE LAW—ACTION FOR DECLARATION—SCOPE OF
REMEDY

THE House of Lords in *Vine v. National Dock Labour Board* [1957] 2 W.L.R. 106 has amplified the decision of the Court of Appeal in *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18. Both cases dealt with the interpretation of the same statutory instrument: the Dock Workers (Regulation of Employment) Order, 1947, which was made under section 2 of the Dock Workers (Regulation of Employment) Act, 1946. The facts in each case were similar. Vine complained that he had been unlawfully dismissed by the Board, acting through its regional organ, the South Coast Dock Labour Board. The local Board had delegated to a small disciplinary committee an investigation of a complaint against Vine for absenting himself from work. His dismissal was due to his conduct having been condemned by this committee. But the delegation of disciplinary powers was, it was alleged, not authorised by the Order or the parent Act.

Vine brought an action for damages and for a declaration that his purported dismissal was illegal, *ultra vires*, and invalid. He was awarded £250 damages for wrongful dismissal and the judge

granted the declaration asked for. The Court of Appeal, Jenkins L.J. dissenting, struck out the declaration, though it agreed with the trial judge that the local Board had no power to delegate its disciplinary powers. The majority of the Court of Appeal based their refusal of the declaration on the ground that the contract was discharged by the nature of the claim; this was, they held, only one for damages for wrongful dismissal (see especially *per Parker L.J.* [1956] 2 W.L.R. 311 at p. 329). The House of Lords unanimously allowed the appeal, all five of their Lordships agreeing that damages were not a sufficient remedy.

The decision is important for three reasons—

(1) The recognition that, although damages for wrongful dismissal are normally an adequate remedy against an individual employer, they are not a sufficient remedy in the case of employment by an undertaking where dismissal involves entire exclusion from the type of employment normally followed by the employee. This is, of course, the case with employment under the National Dock Labour Scheme which makes dock labour a closed occupation.

(2) The condemnation of the expression “quasi-judicial,” as being an expression so sadly lacking in precision that its use has resulted in numerous conflicting authorities instead of producing a well-marked category of activities to which certain requirements of judicial behaviour attach.

(3) The confirmation that *Barnard’s* case was rightly decided when the Court of Appeal held that disciplinary powers cannot be delegated.

There is no doubt that the English courts have hitherto been slower to grant declarations than have the courts in other common law countries within and without the Commonwealth. One reason for this may perhaps be found in the form in which the power is conferred by R.S.C., Ord. 25, r. 5, which reads as follows:

“No action or proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not.”

To state that a course of action shall not be open to objection does not encourage a plaintiff to seek this means of redress as readily as if the right to this relief were expressed in positive terms. Indeed, the wording of the Order may have been responsible for discouraging the courts from granting this additional relief since it does not help merely to know that the relief sought is not open to objection and that it cannot be enforced by process of execution.

On the other hand, it was also argued with some force in *Barnard's* case that, if a court could be asked to intervene by way of declaration, then anyone who was dissatisfied with the decision of a tribunal could start an action in the courts for a declaration that it was bad, and thus secure an appeal to the courts in cases where Parliament intended there should be none. The answer of the Court of Appeal to this objection was that, if a tribunal does not observe the law, then there was no reason why the court should not issue a declaration, and, if necessary, an injunction, in the absence of any alternative remedy; one such is *certiorari*, a remedy which is hedged around by limitations and in *Barnard's* case was not available on account of the time factor.

In *Vine's* case if a declaration had been refused it would have meant that Vine, though compensated for his dismissal by a money award for damages, might be deprived of all subsequent employment as a docker. The Board could have treated the award of damages as concluding the employment and no other work of a comparable nature would have been open to him. The declaration was justified because damages were not an adequate remedy; though unenforceable, it was certain to be heeded by a Government-sponsored national organisation.

Both the Lord Chancellor and Lord Keith were in agreement with Lord Somervell of Harrow who was critical of the expression "quasi-judicial," so far as it suggested that there is a well-marked category of activities to which known requirements of judicial conduct attach. Lord Somervell's speech is a departure from the practice of attempting to distinguish functions as judicial, quasi-judicial and administrative. He held that disciplinary powers, whether judicial or not, could not be delegated. He did not doubt that judicial authority normally cannot be delegated. On the other hand, he expressed the opinion that many administrative duties equally cannot be delegated. He was inclined to look at the consequences of the employer's action in dismissing the appellant rather than to decide the issue by reference to definitions of words so sadly lacking in precision as "judicial" and "administrative."

It must not, however, be assumed from this case that every person who is aggrieved by the action of an administrative authority is entitled to the limited remedy which an action for a declaration affords. In *Vine's* case there was a breach of the law to be remedied, namely, the unauthorised delegation of disciplinary power to the committee. Does this mean that there can be no declaration of right unless there is a positive right to be protected? The case cannot be taken as authority for the proposition that in

the absence of such a right the court can substitute its own discretion for that of the administrative agency, simply on the ground that it considered the decision to be unjust.

In passing it should not escape notice that *Franklin's Case* [1948] A.C. 87 is not mentioned in any of the speeches. It will be remembered that in that case the issue of a rule of natural justice, that of bias, could not be raised because the court held that the action of the Minister in approving a site for a new town was purely administrative. Had it fallen on the other side of the line and come within the category of quasi-judicial functions; that issue could have been raised.

E. C. S. WADE.

PROCEDURE—EVIDENCE EXCLUDED BY STATE INTEREST

THE note on this subject in the last issue ([1956] C.L.J. 133) recorded that the statement of policy made by the Lord Chancellor in the House of Lords in June, 1956, met the chief grievances of the private litigant except that of the wife in *Broome v. Broome* [1955] P. 190, where privilege was claimed for the report of an Army Welfare Worker whose evidence was relevant in a divorce case. It was also noted that the law of Scotland might be more favourable to the subject than the law of England when a claim of privilege was at issue.

The Scotsman of December 1, 1956, reported a judgment of the First Division of the Court of Session in *Whitehall (or se. McLauchlan) v. Whitehall*. In this case the Crown intervened in a divorce action in order to "borrow" certain letters belonging to one of the parties so that they could be sent to London for perusal by the Secretary of State for War. The letters in question had been written to the wife of a soldier, who was seeking divorce, by the voluntary organisation known as the Soldiers', Sailors', and Airmen's Families Association. The ground put forward for the intervention by the Crown was that the Secretary of State wished to examine the letters with a view to issuing a certificate to the effect that it would not be in the public interest for them to be produced in court. The Lord Advocate, supporting the intervention, argued that the morale of H.M. Forces would be lowered unless letters regarding her affairs received by a soldier's wife from the Association were treated as secret and not capable of being referred to in court even by the recipient of the letter. In this connection the Lord Chancellor's statement had disclosed that the Government were not prepared to waive privilege for this

class of document because of the importance attached to the reconciliation work of Welfare Officers, especially when men are serving abroad; Whitehall, incidentally, was serving in England, leaving behind him a wife in Perthshire.

The Lord President, giving the leading judgment of the four delivered, held that it would be "a quite intolerable extension of this privilege were he (a Minister) able, where no question of national safety is involved, to intervene in litigations between private individuals and impound documents which do not come from a servant or agent of the Crown, and were quite legitimately in the possession of parties to the litigation who desire in that litigation to found on their own documents." The court thus upheld the principle which was last year affirmed in *Glasgow Corporation v. Central Land Board*, 1956 S.L.T. 41, that the courts in Scotland retain the right to disregard a ministerial certificate which the English decisions interpreting the rules relating to discovery of documents treat as conclusive. The Lord Chancellor in his ministerial pronouncement had expressed the view that the occasions when a court in Scotland would intervene to overrule the claim to privilege were very few.

The claim to borrow the documents in *Whitehall v. Whitehall* was not, it should be noted, primarily to prevent production, but to sanction abstraction from the documents which had already been lodged by one of the parties in the proceedings before the court. The documents therefore were not secret as regards the other party to the litigation who had had an opportunity to see them. The right of the court in Scotland to intervene rests, of course, on the right to determine whether or not it is in the public interest that the documents should or should not be disclosed. The court, by the Lord President, held that it was conclusive against the intervention by the Crown that the doctrine of the ministerial certificate had never been extended to documents or information which did not emanate from, or come into the possession of, a servant or agent of the Crown in the ordinary course of his official duties. The S.S.A.F.A. Organisation was neither a servant nor an agent of the Crown. In such a situation there was no room for the exercise by a Minister of any right to grant a certificate forbidding production, and therefore no occasion for the court to afford the Minister an opportunity of considering the issue of a certificate. It is perfectly true that the work of effecting reconciliation between married couples may well be hampered if the efforts of conciliators are liable to be disclosed in open court. This is recognised by the ordinary law, as for example in *Henley v. Henley* [1955] P. 202, when the evidence of a village parson who had intervened uninvited

as a conciliator was held to be privileged. If the War Office is convinced that the activities of S.S.A.F.A. workers should receive similar protection, there are other ways that the appeal to State interest for securing the exclusion of the evidence.

The *Whitehall* case was debated on December 20, 1956, in the House of Commons on an adjournment motion (H.C. Deb., Vol. 562, cols. 1600-1610). In his reply the War Minister said that he could not claim privilege for documents of a like nature in future, thereby accepting the ruling of the First Division as declaratory of English law. But he hoped that some degree of confidentiality for communications made to S.S.A.F.A. workers could be retained by the ordinary law.

E. C. S. WADE.

PUBLIC ORDER—BINDING OVER—APPEALS

It is agreeable to call attention to an Act of Parliament which is both very short and also in favour of the liberty of the subject: the Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956. Its one substantial provision can hardly be stated more briefly than in full: "Where, under the Justices of the Peace Act, 1361, or otherwise, a person is ordered by a magistrates' court (as defined in the Magistrates' Courts Act, 1952) to enter into a recognisance with or without sureties to keep the peace or to be of good behaviour, he may appeal to a court of quarter sessions."

This is a valuable safeguard, and it is a tribute to the restraint both of the police and of magistrates that it has not been found necessary before. The *Law Reports* can show some striking cases, probably none more so than *Lansbury v. Riley* [1914] 3 K.B. 229, where speeches in favour of militant suffragettes drew down upon Mr. Lansbury's head the exemplary punishment (it can hardly be called anything else) of having to enter into his own recognisances in the sum of £1,000, finding two sureties of £500 each, or in default being imprisoned for three months. Two notable facts about this drastic magisterial jurisdiction were that it was exercisable without proof of any specific offence against the law, and that there was no effective appeal. In *R. v. Sandbach, ex p. Williams* [1935] 2 K.B. 192, where certiorari was sought on the ground that the recognisances required considerably exceeded the maximum fine for the apprehended offence, Lord Hewart C.J. held summarily that the matter was at the discretion of the magistrates, who would be assumed to have acted properly. And now *R. v. Sharp* [1957]

2 W.L.R. 472 shows that an accused person may be bound over even when he is acquitted.

Writers on constitutional law have not always paid much attention to the general importance of preventive power in the State, although many examples occur in their pages. Dicey's first proposition of the rule of law is that no man may be made to suffer "except for a distinct breach of law." Binding over, however, is resorted to not because there has been a breach of law but because it is apprehended that there may otherwise be a breach in the future. The necessity for some such power is plain: the first duty of government is to preserve order, and until the public peace is secured all talk of a rule of law is premature. Yet in discussing the cases about public meetings, which offer several examples of preventive power in naked form, Dicey strove to base them on distinct breaches of law, or else to class them as exceptions, rather than acknowledge that a paramount power to preserve the peace is a *sine qua non* of the whole legal system. Dicey's dislike of this jurisdiction still finds an echo in Keir and Lawson's commentary on the public meeting cases, upon which some remarks were hazarded in [1954] C.L.J. at p. 267.

The proper attitude to preventive power is, surely, to recognise it for what it is, and to provide for its proper control. It is as a step in this process that the new statutory right of appeal is both beneficent and fundamentally important.

H. W. R. WADE.

CONTRACT—EXEMPTION CLAUSES—DESCRIPTION OR CONDITION

TWENTY years ago in a note in this Journal, (1935) 5 C.L.J. 275, on the case of *Andrews v. Singer* [1934] 1 K.B. 17, I drew attention to the need for distinguishing in a contract for the sale of goods between the terms which "define" the contract goods, and those which are but "conditions" connected with the performance of the obligations of seller and buyer. This thesis was elaborated in a subsequent article, "The Operation of Description in a Contract for the Sale of Goods," (1937) 15 Can.B.R. 764, which should be read in conjunction with an earlier article, "Conditions, Warranties and other Contractual Terms," (1937) 15 Can.B.R. 309. I suggested that greater efficiency could be obtained in the treatment of exemption clauses in contracts of sale of goods if the concept of "definition of goods" were employed. As far as I am aware, textbook writers and judges have neglected the distinction; they do not employ language which distinguishes between (i) promises

to deliver and accept the defined contract goods, and (ii) "conditions" affecting the performance of these promises. Lawyers attempt to handle commercial situations using the ambiguous language under which the word "conditions" applies both to promises, such as promises to deliver the contract goods, and terms which "condition" the operation of "true" promises.

The case of *Karsales (Harrow), Ltd. v. Wallis* [1956] 1 W.L.R. 936 (C.A.) illustrates once again the difficulties in which judges find themselves because of the lack of the use of the concept of defined contract goods. The contract in question was one of "hire-purchase" and not of sale, but the conceptual analysis is unaffected by this fact. The essential facts were that the owner agreed to "lend" a Buick motor-car of a particular registration number, the hire-purchase agreement containing also the exemption clause "No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein." The hirer had inspected the car previously, but between the time of inspection and the time of delivery to him the car had been badly damaged. "It was in a deplorable state. The new tyres had been taken off and old ones put on, the wireless set had been removed from it; the chrome strips round the body were missing; and when the defendant's fitter looked at the engine, the cylinder head was off, all the valves were burnt, and there were two broken pistons. The car would not go." The county court judge, impressed by the width of the exemption clause, which clearly covered express as well as implied "conditions," ordered the hirer to pay the instalments. The Court of Appeal agreed that this was obviously neither just nor lawful. Birkett L.J. said: "Clearly it was the duty of [the owners] to supply to the defendants a 'car' in the ordinary sense of the term, not something that needed towing, because in the true meaning of words a car that will not go is not a car at all." Parker L.J. expressed the same thought in saying "what was delivered was not what was contracted for." Neither dictum is completely accurate. Birkett L.J. speaks of the "true meaning of words," but in the true meaning of the word "car" in many contexts a car that will not go remains a car. This is not only the case with toy cars, or with "cars" on a scrap heap, but with old "cars" sold at an auction in the very condition in which they are, go or no go. One must look to all the terms and circumstances of a contract to discover what is the parties' definition of the contract goods. Parker L.J. does express this thought, and the only caveat that I wish to enter is that qualification of goods may be "contracted for" by way of condition or warranty, and yet not be part of

the definition. I may sell a Buick motor-car "contracting" that the upholstery is leather. If it turns out to be plastic I may well be deprived of a remedy if there is an exemption clause like that in the present *Karsales* case. The description is deprived of contractual effect by the exemption clause. Indeed, it is difficult to envisage a situation where an exemption clause would not apply in such a case. This, however, would be an example. The purchaser is a leather manufacturer who has always said "there is nothing like leather" and for whom it is of business advantage not to be associated with any leather substitute. He might contract for a car with leather upholstery in such a way that "leather" was part of the definition.

The difficulties of language are, however, unimportant compared with those which exist when the judges discuss why the exemption clause does not apply. Denning L.J. says: "The principle is sometimes said to be that a party cannot rely on an exempting clause when he delivers something 'different in kind' from that contracted for, or has broken a 'fundamental term' or a 'fundamental contractual obligation.' However, I think that these are all comprehended by the general principle that a breach which goes to the root of the contract disentitles the party from relying on the exempting clause." Birkett L.J. speaks of "fundamental breach," and Parker L.J. of "fundamental term." These phrases, however, are, without exception, those which are used when an attempt is made to determine the criterion by which "conditions" are distinguished from warranties. Without very careful use the result of employing a test expressed in such language must be to strike out the word "conditions" whenever it appears in an exemption clause. This difficulty has been only partially recognised by Devlin J., who in *Smeaton Hanscomb & Co., Ltd. v. Sassoon I. Setty, Son & Co.* (No. 1) [1953] 1 W.L.R. 1468, said: "I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates." In that case there was no exemption clause referring expressly to conditions.

It is doubtless true that there is a general principle which deals with "fundamental" breaches transcending the terms of exemption clauses, and which applies to all kinds of contracts, not being limited to contracts of sale and hire-purchase. But so far as such

contracts are concerned it is once again submitted that the judgment of particular situations and the exposition of reasoning will be assisted by the utilisation of a concept of the definition of contract goods. This concept is connected with the "difference of kind" of which Denning L.J. spoke. It has to be remembered, however, that "kinds" of goods are not something which exist in nature: the qualities which are definitive of the "kind" of goods which parties agree to deliver and to accept depend on the agreement of the parties.

Karsales (Harrow), Ltd. v. Wallis is welcomed as being a demonstration of the use by courts of the concept of defined contract goods. "Fundamentally" what the court has done is to distinguish between the definition of the contract goods, *viz.*, "a car in substantially the same condition as when it was seen" (*per* Denning L.J.), and the other terms of the contract. It has been seen that the exemption clause, because of the intention of the parties, and not by virtue of some overriding principle of justice, does not apply to the promise to deliver the defined contract goods.

I began this note in pessimistic mood. Let me conclude by recording that some juristic advance has been made. S. J. Stoljar took note of my thesis of the importance of the recognition of a concept of definition of contract goods in his article on "Conditions, Warranties and Descriptions of Quality in Sale of Goods," (1952) 15 M.L.R. 425, 16 M.L.R. 174. He found, however, that I had failed to make "very clear" the criteria for distinguishing descriptive words which operate as a definition of the contract from such words which operate merely as a condition. He may well be correct, though I suspect he is asking for something which cannot be supplied, *viz.*, some rule-of-thumb, mechanically applicable criterion. I return the compliment by saying that his test of "identification" of the contract goods seems no clearer than my test that a quality is definitive if acceptance of goods which do not possess that quality constitutes entering into a new contract. Moreover, he seems to base himself on Williston, but Williston draws only a distinction between identification and warranty, leaving no place for a quality which is neither definitive nor merely the subject of a warranty, but is the content of a condition. Moreover, Stoljar's use of the logician's distinction between *acquaintance* and *description* does not help. The problem is not one of unilateral epistemology but of bilateral definition. Finally, Stoljar appears to me to commit the error of assuming as an *a priori* truth that there are some qualities which can never be "identificatory" to use his language, or "definitive" to use mine (*op. cit.*, p. 441).

In my opinion the parties to a contract of sale may make any quality a definitive one.

The concept of definition of contract goods has also appeared in an article by L. W. Melville in (1956) 19 M.L.R. 26 entitled "The Core of a Contract." This article makes no reference to other juristic writings. In a note in 19 M.L.R. at p. 699 Melville discusses the present case in the light of this notion of the core of a contract which corresponds with my concept of the definition of contract goods.

J. L. MONTROSE.

CONTRACT—EXEMPTION CLAUSES—FUNDAMENTAL BREACH—MAIN
OBJECTS OF CONTRACT

THE construction of exemption clauses so as to refuse their aid to a party in "fundamental breach" of his contract is undoubtedly the most important development in the modern law of contract. The crop of cases for 1956 makes it a vintage year, for it contains one leading authority in each of the three areas in which this doctrine has been largely developed—the bailment, sale of goods (including hire-purchase), and shipping cases. They are *Spurling, Ltd. v. Bradshaw* [1956] 1 W.L.R. 461 (C.A.); *Karsales (Harrow), Ltd. v. Wallis* [1956] 1 W.L.R. 936 (C.A.) (noted by Professor Montrose in this issue at p. 12, above); and *Renton & Co., Ltd. v. Palmyra Trading Corpn.* [1957] 2 W.L.R. 45 (H.L.), previously noted in the Court of Appeal, [1956] C.L.J. 5, 146.

As Professor Montrose suggests, the definition of "fundamental breach" has been made more difficult by the failure to distinguish it clearly from a mere breach of "condition." Indeed, there has been a tendency to equate the two notions in both the shipping and the bailment cases: Lord Atkin in *Hain S.S. Co., Ltd. v. Tate and Lyle, Ltd.* [1936] 2 All E.R. 597, at p. 601; Devlin J. in *Alexander v. Railway Executive* [1951] 2 K.B. 882, at p. 889. Breach of condition gives the party injured a right to rescind the contract; if he does so, the exemption clauses "go and cannot be relied upon by the defaulting party" (*ibid.*, at p. 890). But that principle cannot be applied in every case unless a party is to be refused the opportunity of contracting out of liability for breach of condition, which is plainly not the case. Fundamental breach is something narrower than breach of condition. Although one still meets dicta in which the two are not fully distinguished—Denning L.J. in both the *Spurling* and *Karsales* cases talks of breach going "to the root" of the contract—the difference between

them, gradually developed by the bailment and shipping judgments (see, *e.g.*, Lord Wright M.R. in *Danneberg v. White Sea Timber Trust* (1936) 154 L.T. 25, at p. 29), has been increasingly recognised as a general doctrine of contract since 1953, the year of *The Albion* [1953] 2 All E.R. 679, and the celebrated dicta of Devlin J. in *Smeaton Hanscomb v. Sassoon I. Setty (No. 1)* [1953] 1 W.L.R. 1468.

The law of bailment has long known of fundamental breaches, wrongful acts on the part of the bailee which revest an immediate right to possession in the bailor, subject at any rate to contrary agreement. Such acts disentitle the bailee to rely on the exemption clauses (*Alexander's case*), apparently because the courts construe such clauses as being "subject to the overriding proviso that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or guilty of a breach which goes to the root of it" (Denning L.J. in *Spurling v. Bradshaw*). Parker L.J. made the same point, speaking of "breach of a fundamental term akin to deviation."

In *Spurling's* case eight barrels of orange juice had been stored with the plaintiffs who returned them to the bailor in a seriously damaged state. The cause of the damage was the negligence of the plaintiffs. The first finding was that, applying the principles of the "ticket cases," sufficient notice had been given of an exemption clause of vast proportions, exculpating the plaintiffs for loss, damage, or detention of the goods occasioned by their negligence, wrongful act, or default, printed on the back of a document sent to the bailor some days after the deposit. Denning L.J. considered that "the more unreasonable a clause is the greater the notice which must be given of it," thereby, it is submitted, providing the proper explanation of the dicta in the ticket cases which suggest that a passenger would not be bound by unreasonable conditions; some clauses he thought would need to be in "red ink on the face of the document with a red hand pointing to it before notice could be held to be sufficient." We await further guidance on which exemption clauses reach that pitch of unreasonableness; this one apparently did not. Here the bailor knew that the document contained the contractual terms; it said so on its face. The fact that he did not receive it for some days did not destroy its validity as a contractual document because he had often received them in previous transactions, and knew of the practice. This knowledge of the "course of business" easily disposed of the argument based upon cases like *Olley v. Marlborough Court* [1949] 1 K.B. 532; but it is suggested that even if this had been the first transaction which Bradshaw had entered into, he would not necessarily have

been heard to say that he did not realise that the bailment would be governed by the terms of a document to be sent to him.

But if he was bound by the clause in the document, could he prove a fundamental breach so as to circumvent it? He could not. There had been no failure to redeliver the goods; they had not been sold, given away, or stored in the wrong place—against none of which wrongful acts would the clause probably have protected the bailees, in spite of its literal words. The allegation of negligence, said Parker L.J., “pleaded the complaint made and the only complaint that could be made.” The onus, he thought, was on the plaintiff to show more. If he could show something in the nature of a fundamental breach the burden might be shifted to the defendant, as in *Woolmer v. Delmer Price* [1955] 1 Q.B. 291. Denning L.J. insisted that the onus was on the bailee always to show that he fell within his exemption clause; but since he agreed that mere production of a suitably worded clause was enough where the allegation was only one of negligence, the area of disagreement between him and Parker L.J. is smaller than at first appears. There could, indeed, be no other allegation in *Spurling v. Bradshaw*; the idea that the bailor could have argued total failure to redeliver because the goods were essentially changed is, on the facts, not attractive, even after *Karsales v. Wallis*; but it may help a future bailor if all his barrels are returned empty.

In the area of sale of goods, the idea that a clause exempting the seller from all breaches of contract cannot protect him against a total failure to perform, has been academically popular since *L'Estrange v. Graucob* [1934] 2 K.B. 394. The total failure may take various forms; in particular it may consist in delivery of the goods but failure to pass a good title (*Rowland v. Divall* [1923] 2 K.B. 500), or failure to deliver the articles contracted for. Both headings illustrate how present confusion was largely caused by the failure of the Sale of Goods Act, 1893, to provide a proper conceptual framework for the distinction, made by Professor Montrose in respect of the second heading, between “conditions” and “definitive qualities.” But when do “peas” become “beans”? Certainly no general rule can tell us the answer. There is no “definite answer” to the “question how many parts a thing can have or how much it can change without altering its identity. That is to say there are no general rules from which the answers to such questions can be derived; but this does not mean that they cannot be given answers in particular cases.” (Ayer, *Problem of Knowledge*, p. 110.) The problem revolves, as Professor

Montrose insists, around the way the contractual "thing" is described in the contract. The car was no "car" in *Karsales* because it was so changed from what the hire-purchaser inspected and bargained for. But in that case the Court of Appeal indicated that they were disposed to extend the notion of "fundamental difference" as far as possible to reduce the efficacy of wide exemption clauses. Furthermore, their Lordships insist that no exemption clause, however widely drawn, can protect against fundamental breach: see Parker L.J. at p. 943, and Denning L.J. at p. 940. No one can contract out of liability for fundamental breach—and this apparently includes not only liability to return money received, but also liability in damages. "The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party" (Denning L.J.).

It is in this connection that *Renton v. Palmyra* comes to mind. There, in bills of lading providing primarily for carriage of timber from Canada to English ports, a clause allowed the shipowners to discharge at any safe and convenient port, including the port of loading, in the event of strikes at those ports, such discharge to be deemed due fulfilment of the contract. When strikes occurred, the cargo was discharged at Hamburg. The action was brought to recover damages for breach of contract, two arguments being advanced. The first, that the Hague Rules rendered the strike clause void, failed because their Lordships, although willing to construe the Rules as applying to damage which was not physical, held that the obligation on the carrier to carry and discharge "properly" related only to the mode of performance and had no geographical significance. The second, which had been accepted by McNair J., amounted to a claim that the strike clause should be ignored because it was repugnant to the "main objects" of the contract. Their Lordships agreed with the Court of Appeal that this was not so in the present case. Much prominence is given in their speeches to the statement of Jenkins L.J. which distinguishes between a clause in which there is a "power given to one of the parties which if construed literally would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either arising to prevent or impede performance of the contract in accordance with its primary terms." Such obstacles need not amount to frustration. Here the strike clause fell plainly within the second category: it did not conflict with the primary obligations; it qualified them in certain circumstances, and provided a complete answer to the claim.

More important than this construction, however, is the apparent acceptance by most of their Lordships of the argument, couched in general terms, that "contractual provisions inconsistent with the main object of the contract should be disregarded" (Viscount Kilmuir L.C.). Little prominence is given to the narrower point raised in some previous cases that *printed* clauses must give way to special *written* provisions with which they conflict. The principle is put in a much more general way, and the parallel with the arguments in the *Karsales* case is at once apparent; there is now clear House of Lords authority for the view that exception clauses cannot derogate from primary obligations, which are "dominant and overriding" (Lord Wright in the *Danneberg* case, *supra*, 29).

But the shipping cases also raise a point which now assumes a new importance. Scrutton on *Charterparties* (16th ed., 303), points out that until a particular voyage has been agreed upon "no question of deviation can arise." Just so, there can be no question of exemption clauses being inconsistent with primary obligations until these have been agreed. The first task is to discover these obligations. The critical question is, then, not so much whether a party can contract out of his liability for "fundamental breach" but whether he can succeed in expressing the "exceptions" as a limitation *within* the primary obligations, rather than as an exemption clause derogating from them. He must remember to avoid the charge of advancing no consideration, or one so uncertain that the agreement ceases to be a contract. But, short of that, can he not avoid the doctrine of "fundamental breach" by shrinking the core of the contract to minute proportions? No doubt the regiment of draftsmen is already at the task. Contracts of sale offer a promising field for experiment. Will the new standard form of sale contract provide that the seller shall deliver "a machine with four wheels, or if convenient to him a new Singer car," followed by the usual exemption clause? Would it suffice to oblige him to deliver a "new Singer car, or if obstacles arise to render this inconvenient to him, a machine with four wheels"? Such clauses are hardly more fantastic than the exemption clauses which customers currently have to suffer, and better clauses are not hard to invent. Even if the courts were by statute given power to strike out all "unreasonable" exemption clauses, this shrinkage of primary obligations might leave them little room in which to exercise the power. Will it really be to this that we shall be brought in 1957 by that archaism, "freedom of contract"?

K. W. WEDDERBURN.

TORT—OCCUPIERS' LIABILITY—NOTICE EXCLUDING LIABILITY—
EMPLOYERS' LIABILITY TO SERVANT

IN *Ashdown v. Samuel Williams & Sons, Ltd.* [1956] 3 W.L.R. 1104, the Court of Appeal has affirmed that part of Havers J.'s judgment which held that an occupier's liability to a licensee could be excluded by a notice, the conditions of which had been sufficiently brought to the licensee's attention. Havers J.'s judgment was discussed in [1956] C.L.J. 153, and the case is now more fully considered in the article at p. 39 of this issue.

The Court of Appeal, however, reversed the learned judge's decision that the plaintiff's employers were liable to her for breach of their common law duty not to expose her to an unnecessary risk. In the result, the plaintiff failed in her action against both defendants: against the occupiers of the premises over which she took a short cut to her work because their liability was excluded by notice; and against her own employers, on the facts, because there was no breach of duty by them, or, if there was, because it did not contribute to her injury.

F. J. ODGERS.

MASTER AND SERVANT—VICARIOUS LIABILITY—INDEMNITY TO
MASTER—CONTRACT OF SERVICE

IN *Lister v. Romford Ice & Cold Storage Co.* [1957] 2 W.L.R. 158 the House of Lords, by a majority, affirmed the decision of the Court of Appeal ([1955] 3 W.L.R. 631; see [1956] C.L.J. 101, *et seq.*) and held that the employers of a lorry driver, for whose negligence they had become vicariously liable, could recover over against the driver. It was unanimously held that the driver had committed a breach of his contractual duty of care and that the damage was not too remote, but Lords Radcliffe and Somervell were of the opinion that the employers' claim was defeated by a term which must be implied into the driver's contract of service.

The unanimous decision that in general a master can recover from his servant the damages for which the servant's negligence has made him liable will be welcomed by those who agree with Finnmere J. that justice requires "that the person who caused the damage is the person who must in law be called upon to pay damages arising therefrom" (*Semtex v. Gladstone* [1954] 2 All E.R. 206). Nevertheless, the ease with which this conclusion was apparently reached is, in one respect at least, a little surprising.

Although the existence of the servant's contractual duty of care

has for long been recognised, until the present case it might well have been thought that, since master and servant are joint tortfeasors, the rule in *Merryweather v. Nixan* (1799) 8 T.R. 186, prevented an action for breach of that duty where the master's damage consisted in his vicarious liability to a third party. In the Court of Appeal this aspect of the case was discussed at some length and the conclusion reached that *Merryweather v. Nixan* does not apply where one of two tortfeasors is free from culpable fault. The implication is that where, as in *Jones v. Manchester Corporation* [1952] 2 Q.B. 852, master and servant are both guilty of culpable fault, *Merryweather v. Nixan* applies, with the result that the question of contribution or indemnity only arises under the Law Reform (Married Women and Tortfeasors) Act, 1935. No common law right of action exists and the court must apportion responsibility on "just and equitable" principles under the Act.

In the House of Lords, however, *Merryweather v. Nixan* was not mentioned in this connection at all and was evidently regarded as irrelevant. This seems to imply that the master can sue for breach of the contractual duty of care even if he was personally at fault. In such a case, however, while it cannot be said that the servant's breach of duty has caused the master no damage, the master cannot possibly be entitled to a complete indemnity. An apportionment must be made, and it would seem that the only way in which this can be done is for the court to embark upon an inquiry into comparative causation and thus determine how much of the total damage is to be attributed to the servant's breach of duty.

Such an inquiry may be theoretically possible, but how can it be carried out in practice in a case like *Jones v. Manchester Corporation*? In that case the negligence of the "servant" consisted in the administration to an already anaesthetised patient of the quantity of pentothal necessary to anaesthetise a fully conscious person. This resulted in the patient's death. The negligence of the master consisted in allowing the insufficiently experienced "servant" to administer anaesthetics without adequate supervision. It would seem eminently desirable that the apportionment of liability in a case of this kind should be decided on a broad discretionary basis which may take into account factors such as the relative blameworthiness of the parties, but this is only possible if there is no right of action at common law. Otherwise the discretion conferred by the Act of 1935 cannot be exercised. Perhaps the *ratio decidendi* of *Lister's* case applies only where the master is free from culpable fault, but the speeches contain nothing to suggest that this is so.

Although the action in *Lister's* case was brought in the name of the employers, no secret was made of the fact that their liability had been met by insurers, and it was on this fact that the defence largely relied. Various implied terms to defeat the claim were suggested, all based upon the fact of insurance. None found favour with the majority, but Lords Radcliffe and Somervell held that a term must be implied to the general effect that where a master insures against a particular liability, proceedings cannot be taken against the servant in respect of that liability, either by the master directly or by the insurers acting in his name.

Viscount Simonds expressed the problem as being "whether, in the world in which we live today, it is a necessary condition of the relation of master and man that the master should . . . look after the whole matter of insurance." This approach, which was in general adopted in all the speeches, is justified by the fact that the House was not concerned with one unique contract, but with the relation in which drivers of motor-vehicles and their employers generally stand to each other. As Lord Tucker pointed out, MacKinnon L.J.'s "officious bystander" test is inappropriate to a general question of this kind and a wider view must be taken.

The House thus recognised that the technique of the implied term is part of the machinery by which the law is enabled to interpret and explain contractual relationships in the light of contemporary conditions, and that it is not restricted to filling in details for which the parties omitted to provide. This may well prove an important development, for it should enable the courts to play their part in solving the problems involved in the many relationships which are created by contract but which really involve questions of status rather than of contract.

In the result the majority decision that no term should be implied leaves the negligent employee liable even though his master is insured. The question raised is obviously one of great difficulty and there is much to be said for the opinion of the minority. If it may be said with respect, however, the majority decision is to be preferred. Employees should not be placed in a position to assume that they are free from responsibility for their negligence. If they take steps to provide for their own insurance, either by arrangement with their employers or otherwise, they can protect themselves in the manner available to everybody. To hold that they are automatically protected, however, seems to involve the creation of a special class of persons to whom the ordinary rules of liability for negligence do not apply.

J. A. JOLOWICZ.

QUASI-CONTRACT—WAGES PAID TO INJURED POLICE OFFICER—
CLAIM AGAINST TORTFEASOR

IN the last issue of this *Journal*, [1956] C.L.J. 147, the opinion was expressed that the decision of Slade J. in *Receiver for the Metropolitan Police District v. Croydon Corporation* [1956] 1 W.L.R. 1113 was to be preferred to that of Lynskey J. in *Monmouthshire County Council v. Smith* [1956] 1 W.L.R. 1132. The appeal in both cases has now been heard ([1957] 2 W.L.R. 33) but the Court of Appeal, consisting of Lord Goddard C.J., Morris L.J. and Vaisey J., took a different view. It is encouraging to note, however, that neither Morris L.J. nor Vaisey J. seemed convinced that the law was wholly satisfactory. Morris L.J. went so far as to acknowledge that a case might be put forward for a change in the law "so as to permit the recovery of wages payable and paid in reference to a period of incapacity caused by a wrongdoer."

The question which arose in both cases, it will be remembered, was whether the police authorities, who were by statute obliged to pay the constables' wages even during a period of disability, could recover against tortfeasors who, by their negligence, had disabled the constables from performing their duties. Slade J., following an earlier decision of Atkinson J. (*Receiver for the Metropolitan Police District v. Tatum* [1948] 2 K.B. 68), held that the authority was entitled to recover in quasi-contract. Lynskey J., four days later, held that there had been no unjust enrichment of the tortfeasor and that the action by the authority was no more than the old action *per quod servitium amisit* in disguise. Since the decisions of the Privy Council in *Att.-Gen. for New South Wales v. Perpetual Trustee Co.* [1955] A.C. 457 and of the Court of Appeal in *Inland Revenue Commissioners v. Hambrook* [1956] 2 Q.B. 641, such an action could not succeed.

The Court of Appeal held that Lynskey J. had been right, and based its conclusion on simple and superficially attractive reasons. The claim being based upon the unjust enrichment of the defendants at the expense of the plaintiffs, obviously the plaintiffs must establish that the defendants had in fact received a benefit. This, it was held, they were unable to do. It was true that, by reason of the plaintiffs' continuing obligation to pay the constables' wages, the defendants' liability to the constables was less than it otherwise would have been, but the defendants had met their full legal liability to the constables. The constables had not lost their wages and therefore the defendants came under no obligation to pay them. As Morris L.J. put it, he could not see "that there was any unjust benefit here received by the defendants when they have been held liable for all that they were in law liable to pay."

Lord Goddard C.J., who expressed similar views, also stated that the plaintiffs had lost nothing. Since they were obliged to pay the constables in sickness as well as in health they were no worse off than if the accidents had never taken place. Only if the action *per quod servitium amisit* had been available could the plaintiffs have succeeded.

Both Lord Goddard C.J. and Morris L.J. admitted that the plaintiffs' continuing obligation to pay the constables' wages worked to the advantage of the defendants, but this advantage they evidently regarded as being of the same kind as a defendant may be said to have if the person he injures happens to be a man earning a very low wage. His liability is less than it might have been, but he has not received a benefit. Both referred to *British Transport Commission v. Gourley* [1956] A.C. 185, and emphasised that a tortfeasor's only liability is to pay "such damages as, by reason of his wrongdoing, the plaintiff has sustained." Where an injured man suffers no loss of earnings because he continues to be paid his wages, the tortfeasor incurs no liability for loss of earnings.

It is submitted, however, that there is an important distinction between the case where a man suffers little or no loss of earnings because he is earning little or nothing, and the case where he suffers no loss of earnings because he continues to receive his wages. In the former case the damages paid by the tortfeasor represent in terms of money the actual damage he has caused. The loss suffered by the injured man is small because the damage done, in law at any rate, is also small. In the latter case, however, the loss suffered by the injured man differs from the amount of damage actually caused because he continues to receive his wages. The continuing payment of his wages reduces the loss suffered by the injured man to the extent that he loses no more than if he had not been gainfully employed, but it no more reduces the total damage caused by the tortfeasor than would payment by an insurer.

If this is correct it would seem that the continuing payment of wages does in truth confer a benefit on the tortfeasor. By reason of the payment his liability is reduced from an equivalent of the actual damage he has caused to something appreciably less. To that extent he has benefited, and benefited, surely, at the expense of the person who continues to pay the wages. It is submitted, therefore, with great respect, that the facts of these cases do give rise to a situation in which the principle of quasi-contract can operate.

The judgments of the Court of Appeal clearly proceed upon the assumption that the constables could not themselves have recovered

anything under the head of "loss of earnings" or "loss of earning capacity." This is probably correct, since "loss of earnings" seems to have become a separate head of damage with an independent existence of its own. Yet in principle it would appear to be no more than one aspect of the general damage suffered by an injured person, and it is not necessarily to be ascertained by a simple calculation based on the pre-accident rate of earning (see, e.g., *Rouse v. Port of London Authority* [1953] 2 Ll.L.R. 179, at p. 184). Moreover, it is clear that payment under a policy of insurance does not reduce a plaintiff's claim (*Bradburn v. Great Western Railway* (1874) L.R. 10 Exch. 1) and that payment by the employer of a disability pension does not disentitle a plaintiff from claiming his loss of earnings in full (*Payne v. Railway Executive* [1952] 1 K.B. 26). Loss of earnings may be recovered even where the total amount of wages has been made up through payments by the Minister of Pensions and the employer (*Dennis v. L.P.T.B.* [1948] 1 All E.R. 779, where the plaintiff was ordered to reimburse the Minister and the employer). If the constables could have recovered for "loss of earnings" had they sought to do so, the whole basis of the Court of Appeal's decision falls away.

It is respectfully suggested, therefore, that the decision is not free from doubt. Leave to appeal to the House of Lords was granted, and there would seem to be cogent reasons of policy for allowing recovery in cases of this kind. Employers should not be discouraged by the law from continuing to pay wages to a disabled employee. Perhaps the House of Lords will find a way.

J. A. JOLOWICZ.

EQUITY—DOCTRINE OF ELECTION

Two unusual illustrations of the equitable doctrine of election have been reported recently. (1) *Re Dicey, Julian v. Dicey* [1956] Ch. 357, affirmed by the Court of Appeal [1956] 3 W.L.R. 981, shows that a donee under a document of gift, which purports also to give other property to X, is put to his election if he had any interest, however slender, in that other property. (2) *Re Edwards, Macadam v. Wright* [1957] 1 Ch. 21 holds that when the document of gift is a will the crucial question is whether that donee had an interest in that other property when the testator died.

In *Re Dicey*, the testatrix had devised to her grandson, James, "my two freehold houses in Beresford Road, Walthamstow"; and, by the same will, she had left another house and the residue of

her property to her son, Charles. In fact, both when she made the will and until she died, she had only a life interest in the two freehold houses, with remainder to her son Charles ($\frac{1}{2}$) and James ($\frac{1}{4}$) and another grandson ($\frac{1}{4}$) in common. By her will she had left nothing to this other grandson; so the doctrine of election clearly gave James no rights against him. James's only chance of benefiting in some way from her ineffectual attempt to leave the two houses to him depended, therefore, upon whether the doctrine bound his uncle Charles.

The doctrine of election requires one who benefits under a document of gift—usually it is a will—either to adopt the whole of it, renouncing any rights of his own which are inconsistent with it, or else (“electing *against* the will”) to make compensation out of the benefits which it has given to him. On the face of things, therefore, uncle Charles was put to his election, and so was bound in equity either to convey his half-share in the two houses to James or else, out of (but not beyond) the value of the benefits—the third house and the residue—which the will had given him, to compensate James for the loss of it.

Danckwerts J. and the Court of Appeal (*per* Romer L.J.) decided that Charles was indeed so put to his election. His counsel had strongly contended that the doctrine binds only a person who is the full owner of the property and who thus has it in his power to give precisely what the testator attempted ineffectually to give. But that argument was rejected, after a full review of the authorities including the difficult Scottish case of *Brown v. Gregson* [1920] A.C. 860. The Court of Appeal (at p. 989) explained away certain inconvenient dicta by the Law Lords in that case, on the ground that various fetters on alienation imposed by the law of the Argentine (where the land which had there been invalidly devised was situate) wholly disabled the defendants in that case from making the testator's attempted dispositions “effective at all or by any *relevant* means.” Some of those dicta, one might have thought, and particularly that of Viscount Finlay which the court quoted (at p. 989) as though conclusive, are peculiarly appropriate to a case such as the present: for here what our testatrix had tried to devise was two freehold houses, and (a point not specifically mentioned in the judgments) the law of England imposes upon co-ownership a trust for sale as a result of which the most that Charles had power to convey to the disappointed devisee was an undivided share in a beneficial interest which (by virtue of the doctrine of conversion) is regarded in equity as money. However, it is true that in *Brown v. Gregson*, as in other cases, Chitty J.'s celebrated judgment in *Re Lord Chesham* (1886) 31

Ch.D. 466 (an ineffectual attempt to bequeath settled heirlooms cannot put to his election one whose beneficial interest in them is not assignable) was never doubted. In stating the doctrine of election (at p. 472), he had said that one who takes under a will must "confirm the will *as far as he can*," and must give up to the disappointed legatees "*any* beneficial interest [in the property ineffectually bequeathed to them] that he can dispose of."

In *Re Edwards* (*supra*) a testatrix, three months after making her will, agreed orally with her sister Elise to leave to her a certain house. The consideration for that promise was that Elise should come to live with her as her domestic help. Elise did so. Two months later the testatrix died, after making an invalid codicil in which she had attempted to honour her promise. Subsequently, Danckwerts J. held (in an unreported judgment) that her agreement to leave the house to Elise was a "valid and binding contract"; and her executor accordingly conveyed the house to Elise absolutely. The effect of that contract in equity, it would seem, was to pass the beneficial interest in the house to Elise as from the death of the testatrix—and so to adeem (or perhaps to revoke?) any gift of it that she had made in her will.

In fact the will of the testatrix, after giving some legacies, had directed her executor to sell this house (naming it specifically) and the remainder of her property, and to divide the proceeds of sale equally between seven named relatives, one of whom was Elise. On these facts, Upjohn J. was now asked whether Elise was put to her election. He held that she was, and that, having already taken a conveyance of the house (as above), she had already elected against the will. That meant, from the arithmetic of this situation, that she lost her one-seventh share under the will entirely. [The residue without the house was worth approximately £4,900 (= £700 each), whereas the residue with the house was worth £7,000 (= £1,000 each): so, by electing against the will, she had deprived the other six relatives of a total sum of £1,800. Their right to compensation out of the £700 share which the will had given her meant, therefore, that the whole of it was exhausted.]

The decision that Elise was put to her election was reached, it seems, by treating her (counsel conceding this, *semble*) as a purchaser who had given full value for the house; and so the situation when the testatrix died was that the house, which her will had attempted to devise, belonged in equity to Elise. The decision that the essential facts for raising an election—a gift to *A* plus a gift to *B* of something which belongs wholly or in part to *A*—need not be present at the date of the making of the will, so long as they are present at the testator's death, was based in

part upon Lord Hatherley's speech in *Cooper v. Cooper* (1874) L.R. 7 H.L. 53, and in part upon section 24 of the Wills Act, 1837. That section enacted that every will which shows no contrary intention is now to be construed, as regards the property comprised in it, as if it had been executed immediately before the testator's death; and evidently Upjohn J. considered that, in consequence, one cannot argue nowadays, from the fact that our testatrix owned the house when she made the will, that she could not have intended to make Elise elect between the house and the benefit which the will prescribed for her.

Thus a prospective legatee who, after the date of the will, contracts to buy from the testator some property which the will has specifically bequeathed to another, is put to his election, even if the testator then dies without having actually conveyed it to him. That is understandable: though it seems a harsh equity which so penalises one who has given the testator full value for the property. It is more difficult to understand why a contract merely to "leave" such property to the legatee can compel him to elect. If equity "regards as done what ought to have been done," should not such a contract operate to *revoke* so much of the will as purports to bequeath that property? Clearly that would have been the result if our testatrix, by a valid codicil, had fulfilled her contractual promise. Moreover, even if we ignore that tortured maxim, the fact remains that the real reason why Elise found herself entangled in the doctrine of election was that the testatrix, *in breach of her contract with Elise*, had left the house to other people; on our particular facts, therefore, the equity is harsher still. Yet, for some reason or another, the judgment (as reported) ignores these aspects of the matter. Perhaps they deserve to be ignored: on the ground, perhaps, that if the testatrix had indeed made an effective codicil, "leaving" the house to Elise, there is no knowing that she might not at the same time have cut Elise out of the rest of the will. Or perhaps we should assume that something in the special facts of *Re Edwards* reduced the force of this particular contract. We are told that it was "oral" and that it had been held "valid and binding"; but we are not told whether it was ever put into writing. So perhaps, like *Maddison v. Alderson*, 8 App.Cas. 467, it had never been enforceable by action against the testatrix. [It is understood that Danckwerts J. had found a part performance by Elise in that, in order to come and live with the testatrix, she had been persuaded to give up her tenancy of a rent-restricted dwelling.]

S. J. BAILEY.

TRUST—RULE IN *Lassence v. Tierney*—ACCRUER CLAUSE

THE decision of Upjohn J. in *Re Atkinson's Will Trust, Prescott v. Child* [1956] 3 W.L.R. 900 is a sequel to *Re Burton's Settlement Trusts* [1955] Ch. 60, 348 (C.A.), noted in [1955] C.L.J. 26.

If a trust begins by giving a fund to A and B beneficially in equal shares and then directs, for each share, that it be held upon various trusts for the donee for life and then for his issue, the share of a donee who dies without issue belongs to his estate absolutely: for the rule of construction in *Lassence v. Tierney* (1849) decides that, if trusts engrafted upon an original gift fail, the original gift takes effect.

Sometimes, however, the engrafted trusts conclude with an *accruer clause* which directs that, if they fail, the share is to accrue to the other donee's share. What is to happen, in such a case, if A dies without issue and then B likewise dies without issue? Does A's original share, after accruing to B's share, fall back into A's estate? Or does it accrue permanently to B's share and so become part of B's estate? There were dicta upon this problem in *Re Burton, supra*, but it was immaterial, since there A had bequeathed all her property to B. In *Re Atkinson*, however, it was material; and Upjohn J. held that A's original share returned to her estate. He would have held the contrary, however, had the *accruer clause* been so worded as to imply that A's share, when its trusts failed, was to accrue *permanently* to B's share, or if (as in *Re Litt* [1946] Ch. 154, C.A.) the clause had indicated that A's share, when its trusts failed, was to accrue not merely to B's share but to B.

S. J. BAILEY.

PROPERTY LAW—THE RULE AGAINST PERPETUITIES—REFORM

THE Law Reform Committee's Fourth Report on the Rule against Perpetuities (Cmd. 18) was issued in November, 1956, after a study of this formidable topic since July, 1954. Earlier in 1956 Professor Barton Leach and Dr. J. H. C. Morris had subjected the Rule to a gruelling examination and made many suggestions for its improvement in their remarkable book *The Rule against Perpetuities*, which was reviewed at [1956] C.L.J. 248. It is, therefore, not surprising that Dr. Morris was co-opted onto the sub-committee to which the Law Reform Committee initially delegated their task and academic hearts will surely be gladdened by the number of reforms urged by him and his co-author which have been included in the twenty-two recommendations in the Report,

covering the Rule against Perpetuities, the so-called Rule against Inalienability and the Rules against Accumulations. The figures in parenthesis below refer to the numbers of the relevant paragraphs in the Report.

As to the Perpetuity Rule itself, the Committee regarded the need for some time limit on the vesting of future interests as beyond argument and at once turned to consider the perpetuity period. Although the pattern of family settlements from which it sprang has been destroyed by savage taxation, the existing period of lives in being and twenty-one years still has the merit of being the time during which parents may have a family and their children attain majority (5). However, the hope of inducing conveyancers to eschew the uncertainties inherent in using royal lives as a measure of the period leads to the recommendation that the perpetuity period should be so many years, not exceeding eighty, as the instrument of gift specifies, if any, but otherwise the existing period (9). If eighty years is tolerable where the draftsman prefers a fixed period, would it be objectionable, where he does not, to permit lives in being and twenty-five or even thirty years to meet the common opinion of settlors that distribution of capital to beneficiaries at the age of twenty-one is premature? This suggestion of Professor Leach and Dr. Morris is not discussed in the Report.

Regarding the Rule's application, the Committee favours the validation of many limitations which would at present fail, and only rarely the invalidation of limitations currently permissible. Various methods of reform were considered (10). In the result, the recommendations may be summarised as the adoption of the "wait and see" principle, whereby actual as opposed to possible events are regarded in testing validity, supported by various statutory provisions which would either eliminate certain extremely improbable possibilities, impose favourable constructions on certain limitations which commonly fail, or tidy up the law by clarifying doubts or by making the applicability or inapplicability of the Rule accord with practical considerations. A discretionary *cy-près* jurisdiction to modify excessive limitations is rejected as too unpredictable in operation (24, 30).

The adoption of the "wait and see" rule, the one advantage of the extinct legal contingent remainder, would be generally acclaimed. Although it would be impossible to ascertain *ab initio* the validity or invalidity of such limitations as may or may not vest within the period, a similar inconvenience is already suffered by persons entitled if an admittedly valid gift should eventually fail to vest at all. To minimise such inconvenience, it is suggested

that trustees and other interested parties might at any time apply to the court for a declaration as to whether the validity or invalidity of a gift has become established by events or remains uncertain (17-19, 23). That such a gift might ultimately prove void for perpetuity should be ignored when deciding whether it carries the intermediate income and for the purposes of the statutory powers of maintenance and advancement (20-23).

No sufficiently exhaustive list of fantastic possibilities which should be ignored could be formulated. However, in cases now invalidated by the fateful decision in *Jee v. Audley* (1787) 1 Cox Eq. 324, delay in ascertaining their validity under the "wait and see" rule could be avoided simply by enacting rebuttable presumptions that no male under fourteen and no female under fourteen or over fifty-five can procreate or bear children and by empowering courts to accept such medical or surgical evidence as they think sufficient that a person of any age is similarly incapable. Any decision based on these rules should neither be invalidated by the subsequent birth of a child nor debar that child from taking under any limitation which is not itself void for perpetuity (11-13). The opportunity might well be taken to extend these rules to the rule in *Saunders v. Vautier* (1841) 4 Beav. 115, or even for all purposes of disposition or devolution of property (14).

Favourable constructions are suggested for three situations. First, a class gift should no longer fail utterly if any member of the class might possibly qualify beyond the period, but should be construed as a gift to those members only who qualify in time. In such cases the majority of the Committee wish to see section 163 of the Law of Property Act, 1925 (which may validate an excessive gift by reducing the age to be attained by a beneficiary to twenty-one), applied first, the "wait and see" rule second and the new rule of construction last, since that would exclude some intended members of the class and augment the shares of others. Four members of the Committee and Dr. Morris would like to apply the "wait and see" rule in priority to section 163, since the former may well give effect to the settlor's intention whilst the latter violates it by including additional members of the class (26, 27). The writer respectfully offers his support to the minority's convincing Note. Secondly, any limitation currently invalid solely because some person may marry an as yet unborn spouse should be construed as if only living spouses had been referred to. Thus, in a gift to A with remainder first to any widow he might leave and then to such of his children as should survive both A and any such widow, the class of children who would qualify under the

final limitation, which would today be void, would be ascertained on the death of the widow (if any) provided that she was alive at the time of the gift, but otherwise on A's death (28). Thirdly, no limitation which itself complies with the Rule should be invalidated merely because it is preceded by some invalid limitation, whether or not it expressly or impliedly takes effect after or subject to, or is dependent upon, that invalid limitation; and the invalidity of a prior limitation should automatically accelerate subsequent valid limitations (32, 33).

The tidying-up recommendations are diverse. They would exempt from the Rule's operation the following interests: administrative powers of trustees to sell, lease or otherwise dispose of property, where they are ancillary to valid subsisting trusts (34); all rights of re-entry exercisable in respect of rentcharges, for whatever cause (42, 43); and options in leases to buy the reversion, since the lessee's power to enfranchise would encourage improvements (35-37). Other options, however, purportedly exercisable beyond twenty-one years from their creation should be valid and exercisable even against the grantor's successors in title for up to twenty-one years, but thereafter should be void even against the grantor. Conversely, possibilities of reverter (39, 40) and resulting trusts of personalty analogous to them (41) should be expressly subjected to the Rule as modified by the "wait and see" principle. These would fail, and hence the determinable interests would become absolute, unless the determining event in fact occurred within the period. Lastly, for perpetuity purposes all powers of appointment should be regarded as special powers unless there is a sole donee who can at any moment, unaided, appoint to himself, except that, where the only restriction is that any appointment must be made by will, an appointment so made should nevertheless be regarded as made under a general power, as in *Rous v. Jackson* (1885) 29 Ch.D. 521. These recommendations are likely to receive fairly general support. Extension of the rule to possibilities of reverter (if not already applicable) and to resulting trusts, though against the general trend of the recommendations and entailing some sacrifice of logic, is on balance justifiable in view of their tendency to sterilise the property concerned and of the difficulty of tracing the persons entitled if the determining event occurs at some remote time. With the uncertainty now prevailing as to powers of appointment, what is needed, as the Committee states, is a clear rule, good, bad, or indifferent.

Regarding the so-called Rule against Inalienability which restricts the duration of trusts for non-charitable purposes, the

Committee has to assume that some such trusts are possible notwithstanding *Re Astor's Settlement Trusts* [1952] Ch. 534 (49, 50). To induce settlors who have the means to use them to abandon the devious devices, such as a gift over from one charity to another, now employed to ensure the perpetual upkeep of graves and tombs, it is suggested that any settlor should be permitted to subject a sum up to, say, £1,000 to a perpetual trust to use the income in maintaining any grave, tomb or monument, with or without power to resort to capital (51-53). Animal lovers and devotees of yachting or fox-hunting will not be alone in deploring that the Committee should have confined their attention in this field wholly to the dead and have left the quick to circumvent the law as best they may.

As to the Rules against Accumulations, the general scheme of restrictions now embodied in sections 164-166 of the Law of Property Act, 1925, is approved, subject to the welcome recommendation that two additional accumulation periods should be permissible for settlements *inter vivos*; namely, twenty-one years from the date of the settlement and the minority or respective minorities of any persons living or *en ventre* at that date (56, 57). Further, it should be made clear that the Rules apply alike to accumulations at simple or compound interest and to powers, as well as directions, to accumulate (60). Should not the opportunity be taken to revise the wording of section 164 in accordance with the interpretation which the courts have put upon it, namely, that a direction to accumulate which exceeds the statutory periods is void *only as to the excess*, provided that it does not also exceed the perpetuity period?

The final recommendation, that none of the amendments suggested should be retrospective, save the exemption of trustees' administrative powers from the Rule, but that they might be applicable to instruments becoming operative after the announcement that amending legislation will be introduced into Parliament, seems eminently sensible (67).

The Government has not recently appeared anxious to enter for the Law Reform Stakes wearing the colours of the Law Reform Committee and in the present case one cannot visualise an enthusiastic scramble for that privilege amongst successful participants in the ballot for Private Members' time. Perhaps it is too sanguine to hope that most of these recommendations are as uncontroversial as they seem to the writer, but the remarkable degree of unanimity shown on so complex a subject will, one trusts, cause time to be found somehow for the necessary legislation.

J. W. A. THORNELY.

REAL PROPERTY—POSITIVE COVENANT—DEED—PERPETUITY

THERE are certain old rules relating to deeds which cut across the neat pattern of estates and interests in property. One example is the rule that a grantor may not derogate from his grant, under which both the grantor and his successors in title may become bound by an obligation which is unknown to the general law, so that novel incumbrances can result. A right to the free access of air does not "lie in grant" and so cannot be created as an easement; but if the grantor knows that the land is to be used as a drying yard for timber, he may do nothing on his retained land to impede that use, nor may his successors in title: *Aldin v. Latimer Clark, Muirhead & Co.* [1894] 2 Ch. 437. Thus the grant effectively creates an interest which the law says cannot be granted, and unknown varieties of incumbrances come in by a back door.

In *Halsall v. Brizell* [1957] 2 W.L.R. 123 another entrenchment appears to have been outflanked, this time by a rule that "a man cannot take benefit under a deed without subscribing to the obligations thereunder." It is axiomatic that the burden of positive covenants cannot run with freehold land, and that only covenants negative in nature can bind a purchaser under the rule in *Tulk v. Moxhay* (1848) 2 Ph. 774. Nevertheless it has now been held that the purchaser of a house on a building estate may be bound by a covenant made over a hundred years ago requiring occupiers of plots to contribute to the costs of maintaining roads, sewers, a promenade and a sea wall. Since the purchaser had no option but to take the benefit of the deed if his house was to have any access road and any drains, a method seems to have been found for making the burden of a positive covenant run with land very effectively. Another and no less striking aspect of the case is that the covenant was held to infringe the perpetuity rule, but even this did not prevent its binding a person claiming to benefit by the original deed. Two formidable birds would seem to have been killed with the same stone.

The building estate was developed in 1851, and the plots were sold freehold. The substance of the arrangements was that the roads, sewers, etc., remained vested in the original vendors, but by the deed they were declared to be trustees for the various purchasers, and they covenanted to maintain and preserve these amenities for the purchasers and their successors. The purchasers for their part covenanted that they and their successors would contribute "a due and just proportion" of the costs of maintenance, repairs and improvements, and the deed reserved power for the trustees to distrain for unpaid contributions. These costs,

however, had first to be sanctioned by a meeting of the proprietors, and the deed provided for ordinary and extraordinary meetings, which were given power to make reasonable rules and regulations for the benefit of the estate and for the financial contributions. This scheme appears to have worked smoothly for very nearly a century, the trustees having convened annual meetings at which the contributions for the ensuing year had been fixed. But in 1950, by which time a number of the houses had been divided up into flats, the meeting made a break with its old practice of levying an equal contribution from each plot, and required an equal contribution from each dwelling, subject to a maximum for each plot of a treble contribution. The house in question had been turned into five flats, and the defendants contested the additional levy, amounting to some £6 per annum.

Upjohn J. in fact upheld the defendants' objection, for he found that on a true construction of the deed the resolution calling for separate contributions from every dwelling was *ultra vires*. He held that the "due and just proportion" which each plot-owner had to contribute was intended to be assessed by reference to the plot rather than to the user of the plot, so that assessment by reference to the number of flats was no more permissible than assessment by reference to the number of motor-cars or servants that the owner might keep there. But before reaching that point he dealt with the question whether the covenants of the deed of 1851 bound the defendants at all, and it is here that the interest of his judgment lies. The defendants were the executors of a purchaser who had bought the plot in 1931 and taken a conveyance subject to the covenants in so far as they might be capable of affecting the land. The learned judge held that there were two obvious obstacles in the path of the trustees: the fact that the covenant was positive (it was plainly a question of "putting the hand in the pocket"), and the rule against perpetuities. He also held that the power of distress was *prima facie* ineffective against the defendants because the provisions for contribution did not create a rentcharge. Yet all these impediments melted away before the plot-owners' need to use the roads and the sewers. If they wished to benefit from the deed, they must accept all its terms.

One limit to the application of this doctrine is patent. It can apply only where the owner of the burdened land is seeking to exercise some privilege to which he would otherwise have no right. The learned judge was careful to point out that, apart from the deed, the owners had apparently no right to use the road or the sewers connecting with their house: those were still vested in the trustees, and no implied or prescriptive rights could have arisen

since they had been used at all times under the terms of the deed, and on those terms only. If that important element is kept in mind, it may after all appear that the decision does not go very far out of the ordinary run. An owner who has no right to use the necessary roads or sewers will soon have to come to terms with the proprietors thereof, and if he is enabled to do so under a deed which safeguards him against paying an undue contribution, he may well congratulate himself. The argument that novel burdens can thus be imposed upon land is countered in theory at least by the fact that the plot-owner does not have to adopt the deed unless he wishes to do so. What remains, nevertheless, is a model example showing how, in a suitable case, the rule against positive covenants binding successors in title can be circumvented. It can now be classed alongside the device of an enlargeable lease (Law of Property Act, 1925, s. 153 (8); Challis, *Real Property*, p. 335) as a means of making covenants run with land which could not otherwise do so. All that the covenantee need do is to reserve control of some essential facility, and impose positive covenants in connection with it. Vendors who take restrictive covenants are often in a position to do this, particularly in the case of building schemes.

While it says much for the skill of the authors of the deed of 1851 that their intricate scheme of covenants should have proved so effective, it ought to be observed that the rule as to deeds has been applied in a much wider form than in any previous case. The only precedent cited by Upjohn J. is a reference to Co.Litt. 230b interjected by Lord Cozens-Hardy M.R. in argument in *Elliston v. Reacher* [1908] 2 Ch. 665, but the principle played no part in the Court of Appeal's decision. Stray references to the doctrine always lead directly back to this text of Littleton, which Coke illustrated by some cases from the year-books. Those cases deal with the problem of suing a person who has been *made party* to a deed, but has omitted to execute it; and the doctrine is, that if one of the parties to a deed takes the benefit of it, he can be sued upon it even though he did not execute it. An accurate statement, presumably, is that of Lord Denman C.J. in *Webb v. Spicer* (1849) 13 Q.B.D. 886 at p. 893: "a man may be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assent to it, and take a benefit under it." It is in the same guise that the doctrine appears in *R. v. Houghton-le-Spring* (1819) 2 B. & Ald. 375, and it is only as to a *party* that the rule is stated in Norton on *Deeds*, 2nd ed., 26. It must be doubtful whether any wider rule has hitherto existed, despite Upjohn J.'s statement that "it is conceded that

it is ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder.”

Formulated in this extensive way, the new rule may not have very much in common with that found in Coke's commentary. Upjohn J.'s rule looks more akin to some kind of implied contract, by which a person who seeks to make use of another's property impliedly accepts the intended terms. That would explain why an obligation which was from the outset void for perpetuity (against third parties) could continue to operate effectively, for each successive plot-owner would be bound not so much by the original covenant as by his own actions. By contract all things are possible, and such a development could be welcomed without any fear of foisting new interests upon the law of property.

H. W. R. WADE.

OCCUPIERS' LIABILITY: A FURTHER COMMENT

F. J. ODGERS

THE Occupiers' Liability Bill had its second reading in the Commons on March 6, 1957. It is identical with the Bill that was given its second reading in the Lords on June 21, 1956, and, on a number of points, departs substantially from the recommendations of the Law Reform Committee of October, 1954.¹ It is now thought that the Act will be in force (in one form or another) on January 1, 1958. It continues to cast its shadow before it and shadows are notoriously boggy-like. The Report was castigated for encouraging the exhibition of notice boards excluding liability: the Bill has been abused for permitting it.² A desire to anticipate the less controversial provisions of the Bill has recently led to some judicial glossing of the differences between the occupancy and activity duties of an occupier. It is time, perhaps, for a brief recapitulation of some aspects of the Bill, in the light of recent decisions.

The Law Reform Committee was invited to consider whether any, and if so what, improvement, elucidation or simplification was needed in the law relating to the liability of occupiers to invitees, licensees and trespassers. It made no recommendations about trespassers but advised codification of the law in other respects.³ This is attempted in the Bill with more caution and less precision than in the Committee's Report.

The Bill proposes new rules "in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them."⁴ It seems clear, however, that despite the reference to things done or omitted to be done on the premises the Bill relates only to "occupancy duties" as distinct from "activity duties."⁵ The new rules are to regulate the nature of the duty *imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated*

¹ *The Third Report of the Law Reform Committee (Occupiers' Liability to Invitees, Licensees and Trespassers)*: Cmd. 9305. Considered in C.L.J. (April, 1955), p. 1.

² (1956) 19 M.L.R. 532, 536.

³ Mr. Kenneth Diplock Q.C. (now Mr. Justice Diplock) dissenting.

⁴ Clause 1 (1).

⁵ In Professor Newark's classification: (1954) 17 M.L.R. 102, 108-109; Winfield, 668.

as giving) to another to enter or use the premises.⁶ They are to operate between an occupier and his visitors as such in place of those at present operating between the occupier and his invitees and licensees as such. If the Bill becomes law in its present form, a claim which today is based on the occupier's liability, as occupier, to his invitee for unusual dangers or to his licensee for concealed dangers or traps, will in future be governed by the statutory provisions. But where today a defendant is liable in negligence for breach of duty in carrying on an activity on premises, whether he be the occupier himself, or his servant, or an independent contractor or for that matter a trespasser, and the category into which the visitor falls is irrelevant,⁷ the common law rules will continue to apply and questions of interpretation of statutory provisions, either as to the nature of the duty or its exclusion, will not arise. This, at any rate, appears to be the intention of the Bill.

OCCUPANCY DUTY

The occupancy duty of an occupier will be the same to all his visitors. There will no longer be a difference between the duty to an invitee and that to a licensee; material interest on the part of the occupier in his visitor's entry will no longer determine the duty owed; the refinements of distinction between unusual dangers and concealed dangers or traps will disappear. The duty owed to all visitors will be the "common duty of care" which is defined as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."⁸ The issue will thus be one of fact to be determined with regard to all the circumstances of the case including, in the express terms of the Bill, the purpose for which the visitor enters, the degree of care and of want of care which would ordinarily be looked for in such a visitor (so that, for example, in proper cases the occupier must be prepared for children to be less careful than adults and may expect a person, in the exercise of his calling, to appreciate and guard against any special risks ordinarily incident to it), and any warning given by the occupier.⁹ A warning of a danger is not to be treated without more as absolving the occupier, so that the difficulties raised by

⁶ Clause 1 (2).

⁷ *Dunster v. Abbott* [1954] 1 W.L.R. 58; *Slater v. Clay Cross Co.* [1956] 3 W.L.R. 232; *Riden v. Billings* [1956] 3 W.L.R. 704.

⁸ Clause 2 (1) (2).

⁹ Clause 2 (2) (3) (4).

the decision in *London Graving Dock v. Horton*¹⁰ will disappear. Moreover, the severity of *Thomson v. Cremin*¹¹ will be removed and the law as stated in *Haseldine v. Daw*¹² and *Woodward v. Mayor of Hastings*¹³ will be restored:

“Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.”¹⁴

It is hoped that if the issue is consistently treated as one of fact the new provisions will result in substantial justice being done to all types of visitor. In determining whether what was done or not done by the occupier was in fact reasonable, and whether in the particular circumstances of the case the visitor was in fact reasonably safe, the court will be free to consider matters that have proved relevant in the past such as the obvious nature of the danger, warnings, lighting, fencing, the age of the visitor, the purpose of his visit, the conduct to be expected of him, and the state of knowledge of the occupier. Presumably it will still be proper to consider whether the visitor is on the premises for his own purposes, at his own request, with the grudging permission of the occupier or is there for the occupier's purposes and at the occupier's request made with a high degree of urgency. Such considerations may well be relevant in deciding whether each has acted reasonably in the circumstances. But it is clear that there will no longer be any magical difference between a person gratuitously permitted to use a field as a short cut to a public-house and, for instance, a doctor crossing the same field in answer to the occupier's urgent summons. It seems, therefore, that the common duty of care, as defined in the Bill, will impose on an occupier a greater burden than at common law towards persons permitted to use premises for purposes conducing merely to their own convenience or advantage and towards those for whom permission is inferred only from acquiescence.¹⁵ To these, in particular, an occupier who is reluctant to incur expense in inspecting, repairing

¹⁰ [1951] A.C. 737.

¹¹ [1953] 2 All E.R. 1185 (H.L.).

¹² [1941] 2 K.B. 343.

¹³ [1945] 1 K.B. 174.

¹⁴ Clause 2 (4) (b).

¹⁵ Cmd. 9305, paras. 70-72.

or maintaining his premises may wish to take steps to exclude or restrict his liability.

EXCLUSION OF LIABILITY

On the avoidance of liability, the Bill contains three relevant provisions. It provides, as has been seen, that where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.¹⁶ So that the giving of a warning of a particular danger may, on the facts, discharge the common duty of care because its effect is "to see that the visitor will be reasonably safe in using the premises." But it may not be enough. The Bill further provides:

"The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."¹⁷

Thus, the occupier will not be liable to a visitor if it appears from all the circumstances of the case that the principle *volenti non fit injuria* is applicable: an occupier who has not taken reasonable care may escape liability if he can show that his visitor had freely consented to run the risk of injury caused by such carelessness. The difficulties of the defence of *volens* in negligence cases are notorious but this provision is presumably inserted *ex abundantia cautelae*. It is saying, in effect, "whatever may be the effect of the other provisions of this Act, the existing rules of *volenti non fit injuria*, whatever they may be, are not excluded."

There remains, however, the provision that an occupier owes the common duty of care to all his visitors *except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise*.¹⁸ This is the Bill's more cautious version of the recommendation of the Law Reform Committee.¹⁹ The introduction of the words "in so far as he is free to do so" indicate that the occupier is to have no greater power to exclude or restrict his duty than he has at common

¹⁶ Clause 2 (4) (a).

¹⁷ Clause 2 (4) (b). 445

¹⁸ Clause 2 (1).

¹⁹ Cmd. 9305, para. 78 (iii): "The common duty of care should be capable of extension, restriction, modification or exclusion by any representation or condition expressly or impliedly made or notified to the person entering in connection with the occupier's invitation or permission."

law. What is his power in this respect? It must not be confused with the giving of a warning in respect of a particular danger. Such a warning is the performance, wholly or in part, of the admitted duty. But is the power to exclude the duty something different from, or only an aspect of, the defence of *volenti non fit injuria* which is preserved, as has been seen, in a separate provision of the Bill? If a visitor enters the premises in exercise of a right conferred by contract then it is clear both at common law and under the Bill that the contract can regulate the duty. The Bill provides, in effect, that if the contract is silent the common duty to take care shall be owed.²⁰ But the contract can impose a greater duty or provide for a more restricted duty or for no duty at all. If the entry is by invitation or permission not involving a contractual right, how can the duty to take care be excluded? It can again be excluded by contract, but if the entry is not under contract it is unlikely that there will be a contract (in the ordinary legal sense) affecting the duty. What, then, is meant by "agreement or otherwise"? If there is "agreement" by the visitor amounting to a voluntary assumption of the risk of injury on the ordinary principles of *volenti non fit injuria* then that defence will bar his claim. Is there a different situation in which the visitor is not *volens* but the occupier has in his invitation or permission excluded the common duty to take care?²¹ The driver of a car on the highway obviously cannot exempt himself from his duty to take care by carrying on the front of his vehicle a conspicuous notice excluding it. But if he gives a lift to a hiker, he can do so on his own terms; and the terms, if clear, can exclude liability for negligence. The passenger, in such a case, agrees to run the risk of negligence by the driver, or, in other words, is *volens*. There is agreement, although there is no contract to carry him. Dr. Glanville Williams has stated the proposition (in a different context) in the following form: "If the giving of an effective consent to the risk of negligence requires some sort of agreement between the parties, the question may be asked whether this agreement must follow the rules of the law of contract. The answer may well be in the negative. . . . It seems that there is no need to inquire into the existence of consideration for the agreement, though consideration would be present in the great majority of cases."²² It has been argued, indeed, that between driver and casual passenger there is a contract: "I, the driver, agree to carry you free

²⁰ Clause 5.

²¹ For a vigorous denial of such a distinction, and a vehement attack on the decision of Havers J. in *Ashdown v. Samuel Williams* [1956] 3 W.L.R. 128 (since affirmed by the Court of Appeal [1956] 3 W.L.R. 1104), see Professor L. C. B. Gower in (1956) 19 M.L.R. 532.

²² *Joint Torts and Contributory Negligence*, p. 312.

on the terms that you agree to give up what would otherwise have been your common law rights." But this view was expressly rejected by Lord Greene M.R. in *Wilkie v. L.P.T.B.*²³:

"It is clearly nothing but a licence subject to conditions, a very common form of licence, e.g., a licence to a neighbour to walk over a field, providing he does not go with a dog. You cannot spell such a thing as that as being a contract: 'I will let you go across my field in consideration of you, as a contracting party, agreeing not to take your dog.' . . . It is the mere grant of a revocable licence subject to a condition that, while the licence is being enjoyed, certain consequences shall follow. That is not contractual, but is a term or condition of the licence, and if anyone makes use of the licence he can only do so by being bound by the condition."

Professor Gower has doubted the validity of Lord Greene's analogy. He has said: "Obviously I can make my permission subject to a condition that the licensee shall not take a dog. If he does, he ceases to be a licensee and becomes a trespasser. It by no means follows, however, that I can effectively make my permission subject to a term that although the licensee remains a licensee I shall not be subject to the liabilities of a licensor."²⁴ But surely, in reply to Professor Gower, an occupier can say: "You have your choice: stay out of my premises or enter them on my terms. You will be a trespasser unless you have my permission. I give it subject to your agreeing that I owe you no duty. If, later, you claim to have entered without so agreeing you must admit you have entered without my permission and you will indeed be a trespasser."²⁵

Be that as it may, the Court of Appeal has accepted the principle involved in Lord Greene's proposition without demur. In *Ashdown v. Samuel Williams, Ltd.*²⁶ it has affirmed that part of the decision of Havers J.²⁷ which relates to the exclusion of the liability of an occupier to a licensee by the exhibition of a notice, the occupier having on the facts taken all reasonable steps to bring the conditions to the notice of the licensee. Singleton L.J. had no doubt as to the occupier's right to exclude his duty by a term in a mere licence and relied on *Wilkie v. L.P.T.B.* Jenkins L.J. said—

²³ [1947] 1 All E.R. 258, C.A.

²⁴ (1956) 19 M.L.R. 532, 536.

²⁵ A somewhat similar argument was, it is true, rejected by du Parcq L.J. in *Cosgrove v. Horsfall* (1946) 62 T.L.R. 140; but in that case the action was against the driver of a bus, not against his employers with whom agreement to exclude liability had been made.

²⁶ [1956] 3 W.L.R. 1104.

²⁷ [1956] 3 W.L.R. 128; (1956) C.L.J. 153.

"It is not in dispute that it is competent to an occupier of land to restrict or exclude any liability he might otherwise be under to any licensee of his, including liability for his own or his servant's negligence, by conditions aptly framed and adequately made known to the licensee."²⁸

Parker L.J. was explicit—

"It is, I think, clear that in granting a licence to enter on land the occupier can impose conditions whereby he is absolved from all or some liability which he would otherwise be under at common law. If authority were needed it is to be found in *Wilkie v. L.P.T.B.* a decision of this court and binding on us. That was a case of a licence to travel on the defendants' vehicles, but it decided that conditions could be attached to such a licence cutting down the common law rights which the licensee would otherwise have."²⁹

The court was not entirely happy about *Henson v. L.N.E.R. & Coote and Warren, Ltd.*³⁰ a case in which the plaintiff was held not bound by conditions' excluding liability on the back of a "walking pass" issued to him by a railway company. In that case the Court of Appeal held that the pass was not a contract and Scott L.J. said—

"Theoretically it might be within . . . the defence to argue alternatively that the plaintiff was an invitee, who had accepted an invitation to enter and be upon the defendant company's premises on an express condition, brought home to his mind that if he was hurt by the invitor's negligence he would have no right of action. But to this plea, the answer would be the same, namely, that the defendant company had not taken all the steps reasonably necessary to bring that astonishing surrender of his elementary rights home to his mind."

It was argued in *Ashdown's* case that, where there is a licence only as distinct from a contract, *Henson's* case was authority for saying that actual knowledge of every word of the excluding or restricting condition must be brought home to the non-contractual licensee before he could be held bound by it. But the argument was not accepted despite the strong language of Scott L.J. quoted above. Jenkins L.J. said:

"I see no reason in principle for holding that something more is needed to give a mere non-contractual licensee constructive

²⁸ [1956] 3 W.L.R. 1104, 1112.

²⁹ *Ibid.*, 1117. It may be remembered that Jenkins L.J. was the Chairman of the Law Reform Committee which produced the *Report on Occupiers' Liability* (Cmd. 9305) and that Parker L.J. was a member of it.

³⁰ [1946] 1 All E.R. 653.

knowledge of a condition restricting or excluding his ordinary right to be treated with reasonable care while on the land to which the licence relates, than is required to give a party to a contract constructive knowledge of a term restricting or excluding some right of action he would or might otherwise have under the general law.”³¹

So that, whether we like it or not, *Ashdown* is an authority that the liability of an occupier can be excluded by conditions attached to a licence, provided the occupier has taken all reasonable steps to bring the conditions to the licensee's notice. Although the point is never expressly made in the case, it is submitted that the Court of Appeal is saying that the plaintiff, in such a case, fails because he is *volens* either expressly or by inference. It is his agreement, based on the terms of the licence notified to him, that prevents his suing. It makes no difference whether his agreement is given by a contract or by acceptance of a gratuitous licence.

“I can see no difference in principle between the case of a contract and a licence subject to conditions. In both cases the person claiming exemption must show that he did all that was reasonable in the circumstances to bring the conditions to the other party's notice. Once that is proved it cannot, in my judgment, make any difference that the other party acted unreasonably or deliberately in not reading the conditions.”³²

Such then is the position in law today, as decided by the Court of Appeal. And, in this respect, it will be the same if the Bill becomes law in its present form. The occupier's duty can be excluded by contract. It can be excluded by “agreement,” not amounting to a contract. This, it is submitted, is an application of the *volens* maxim—“some sort of intercourse or communication between plaintiff and defendant from which it can reasonably be inferred that the plaintiff has given an assurance to the defendant that he waives any right of action he may have in respect of the conduct of the defendant.”³³ Such agreement can be achieved by an adequate notice sufficiently brought to the attention of the visitor. The duty can be excluded “otherwise” in so far as the occupier is free to exclude it, *e.g.*, by rules and regulations, made and published under by-laws or other statutory authority, which are binding whether “agreed to” by the visitor or not. Moreover, where a visitor knowingly exposes himself, while on the premises, to a particular physical risk, the occupier may raise

³¹ [1956] 3 W.L.R. 1104, 1116.

³² Parker L.J., *ibid.*, 1118.

³³ Dr. Glanville Williams in *Joint Torts and Contributory Negligence*, p. 314.

against him the defence of *volenti non fit injuria* in its other aspect as understood and applied more commonly in the last century. But since 1945 it is much more likely that the conduct of the visitor on the premises will be dealt with as contributory negligence, resulting in a reduction of his damages, and not as a voluntary assumption of risk amounting to a complete answer to his claim.³⁴

DIFFICULTIES IN PRACTICE

There may, of course, be practical difficulties in the application of the *Ashdown* decision. The power to exclude by notice the common duty to take care prescribed by the Bill will be available against visitors who today would fall into the class of invitees. A widespread practice of exhibiting notices could produce complications in everyday life. What would be the attitude of a milkman, postman, delivery man, laundry man, window cleaner, newspaper boy or telegraph boy if he were confronted by a notice telling him that if he entered the premises it would be entirely at his own risk and that he would have no remedy if injured through the occupier's failure to take reasonable care?³⁵ And what would be the attitude of the trade unions? The response to the notices might well be a refusal to visit the premises whether to deliver goods or to render services. It is true that such a refusal would inevitably bring about the removal of the notices, but there might well be difficulties over pioneering visitors who, wrongly assuming that the notices did not apply to them, entered on business and suffered injury. The Bill provides that for the purposes of the clause defining the common duty of care "persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not."³⁶ As the occupier can exclude his duty only "in so far as he is free to do so" he cannot, presumably, exclude it in the case of a visitor who is entitled by law to enter, but the line between such a visitor and a professional, commercial or business visitor can be a fine one. And will insurers quote lower premiums if notices are exhibited, and so encourage occupiers to erect them? Undoubtedly there are, or can be, difficulties.

Professor Gower has said that "it is greatly to be hoped that attention will be given to this matter before the Bill is finally

³⁴ Law Reform (Contributory Negligence) Act, 1945; *Slater v. Clay Cross Co.* [1956] 3 W.L.R. 232.

³⁵ For a vivid picture of the "endless and horrifying" possibilities of notices, see Professor Gower, (1956) 19 M.L.R. 532, 533.

³⁶ Clause 2 (6).

enacted.”³⁷ Dr. Goodhart has agreed with this.³⁸ What could the Bill do? It could provide that the common duty of care should not be capable of exclusion at all.³⁹ But this would be too drastic. It would impose too great a burden on an occupier giving gratuitous permission to a visitor to use the premises entirely for his own purposes and convenience. It would hardly be practicable to prevent the exclusion of the duty in the case of those who are at present invitees, while allowing it in the case of licensees: this would reintroduce the categories the Bill is seeking to abolish. Would a compromise be practicable? Could the Bill leave an occupier free to set up an agreement by his visitor to relieve him of the duty of care, but provide that such an agreement should not be achieved by the exhibition of a notice and no more? It may be remembered that the confusion before 1830 as to the right of a common carrier of goods to limit his liability by the mere exhibition of a public notice, and the admitted risk of abuse that the public notice system involved, led to the Carriers Act, 1830. The Act provided, with certain exceptions: “no public notice or declaration . . . shall be deemed or construed to limit or in anywise affect the liability at common law” of common carriers, who were to be liable at common law “any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.” But it was also provided that nothing in the Act was to affect any “special contract” between the carrier and his customer.⁴⁰ The carriers’ legislation is hardly a happy precedent, but it may indicate a possible compromise. The draftsman’s task is one of great difficulty. He must not be blamed for the present situation. The *Ashdown* decision is a decision on the common law rules applicable to an

³⁷ (1956) 19 M.L.R. 537.

³⁸ (1956) 72 L.Q.R. 471.

³⁹ Public policy has sometimes required such a provision. For instance, the Road Traffic Act, 1930, s. 97 provides:

“Any contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of any person in respect of any claim which may be made against that person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle . . . be void.”

And the Law Reform (Personal Injuries) Act, 1948, s. 1 (3) provides:

“Any provision contained in a contract of service or apprenticeship, or in an agreement collateral thereto (including a contract or agreement entered into before the commencement of this Act), shall be void in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed or apprenticed by the negligence of persons in common employment with him.”

(Has this, perhaps, been overlooked by Professor Gower in (1956) 19 M.L.R. at p. 533?)

⁴⁰ Carriers Act, 1830, ss. 4, 6. See Blackburn J. in *Peek v. North Staffordshire Ry. Co.* (1862–1863) 10 H.L.Cas. 473 at pp. 496–497, and Lord Chelmsford at pp. 580–582.

injury in 1949. But if (to adapt the well-known comment on the defence of common employment) the seed planted long ago in the "ticket cases" has been watered by the Court of Appeal, the Bill in its present form may give it increase. And increase, at least, is to be avoided.

ACTIVITY DUTY

This comment has so far been confined to the occupancy duty of an occupier, and its exclusion, as the law is and as it will be under the Bill in its present form. But there are even greater difficulties. The *Ashdown* case has sanctioned the exclusion by notice not only of the occupancy duty but of the activity duty of the occupier. The plaintiff's injury in *Ashdown* was not caused by the static condition of the premises but by fly-shunting operations carried out, without reasonable care, by the defendants' employees. It was accepted in the case that if the plaintiff's licence had been free from special conditions her claim would have been unanswerable, for quite apart from his liability in relation to traps or concealed dangers of which he knows but against which he omits to give warning to his licensee,

"the occupier is also liable if he or his servants do any act of positive misfeasance by which the licensee suffers harm, as by negligently driving over a person whom he has permitted to use a private way. The licence is granted subject to existing dangers, but no further act must be done by the grantor or his servants to endanger the safety of the person to whom it was given."⁴¹

It was argued strenuously that the terms of the notice related only to the static condition of the premises—that the negligence to which the notice referred was negligence in failing to make the land reasonably safe or in failing to warn. It was submitted that the wording was not adequate to cover supervening negligence of the kind which caused the plaintiff's injuries. The court, however, not only accepted that liability for such negligence could be excluded by notice provided the words were adequate and free

⁴¹ [1956] 3 W.L.R. 1104, *per* Jenkins L.J. at p. 1112, quoting with approval Salmond on *Torts*, 11th ed. (1953), p. 573. The classic statement of this rule is by Cockburn C.J. in *Gallagher v. Humphrey* (1862) 6 L.T. 684:

"The grantee must use the permission as the thing exists. It is a different question, however, when negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way."

In the case the plaintiff had both his legs broken by a sack of sugar negligently dropped on him by the occupier's servants working a crane on his wharf. And see Winfield, 701.

from ambiguity, but held, on the facts, that the words used were sufficient: "whether or not such injury or damage is in any way whatsoever due to any negligent act, breach of duty, default and/or omission." It seems that the court's finding on the adequacy of the notice was in part dependent on the fact that the plaintiff knew of the operations conducted on the premises. Parker L.J. said:

"Each case must, of course, depend upon its own facts, and in particular on what the licensee knows as to the user of the land. Where, for instance, an occupier of land used as a shooting school desires to exclude liability for negligent shooting, he may well have to bring to the knowledge of the proposed licensee that the land is so used. A mere reference to negligence without a warning as to the user of the land might well be insufficient. In the present case, however, the plaintiff knew that the land was intersected by railway lines even before she saw the notice—she had walked out that way on her first visit. Moreover, by the time of the accident she knew full well that shunting operations took place, and, indeed, that these were conducted by the first defendants. Accordingly she knew the user of the land just as well as if the notice itself had said 'Beware of shunting operations,' followed by an exemption of negligence."⁴²

And Singleton L.J. said—

"I should feel more difficulty if we had to consider a claim arising from negligence in the driving by the defendants' servants of a motor-car and damage arising therefrom. The danger arising from shunting operations was one which must have been present to the mind of everyone who went on the property, and the words of the notice were intended to relieve the defendants from liability for negligence during that operation. We ought so to read them and to hold that her claim against the occupiers is barred."⁴³

So that a notice, on its true construction, may not be adequate to exclude an activity duty while being adequate to exclude an occupancy duty. There is greater opportunity for the court to deny the efficacy of a notice where the defendant has conducted operations negligently on his premises, but it is clear that liability for such activities can be excluded by suitable wording. As has been suggested earlier,⁴⁴ the Bill does not appear to apply to activity duties, and recent decisions of the courts have tended to

⁴² [1956] 3 W.L.R. 1104, 1120.

⁴³ *Ibid.*, p. 1111.

⁴⁴ Above, p. 40.

classify as activity duties some that would in the past have been regarded as occupancy duties. This tendency is due to a desire to escape from the difficulties and artificialities of the invitee and licensee relationship and, in effect, to apply the common duty of care as it will be if the Bill comes into force. The most striking statement of this attitude is to be found in the judgment of Denning L.J. in *Slater v. Clay Cross Co.*⁴⁵—

“The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished, but this result has already been virtually attained by the decisions of the courts. . . . This distinction has now been reduced to vanishing point. . . . The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them: and it makes no difference whether they are invitees or licensees. At any rate, the distinction has no relevance to cases such as the present where current operations are being carried out on the land.”

The last sentence of this is indisputable, as is Denning L.J.'s example

“If a landowner is driving his car down his private drive and meets someone lawfully walking upon it, then he is under a duty to take reasonable care so as not to injure the walker; and his duty is the same no matter whether it is his gardener coming up with plants, a tradesman delivering goods, a friend coming to tea, or a flag seller seeking a charitable gift.”⁴⁶

And in *Slater's* case the plaintiff was injured by the defendants' negligence in operating a small gauge railway. But in *Dunster v. Abbott*⁴⁷ it is not so clear that the plaintiff was injured by anything but the static condition of the premises, although Denning L.J. treated the occupier's act in switching off a light, as the visitor was leaving, as a “current operation.” However, in that case the plaintiff failed on all counts: the bridge over a ditch into which the plaintiff fell was not an unusual danger, nor was it a concealed danger, and, on the facts the defendant was not negligent in switching off the light.

In *Slade v. Battersea Hospital Committee*⁴⁸ the plaintiff, who had been visiting her husband in hospital and was on the way out, slipped on part of the floor of the ward where polish had recently been applied. Finnmere J. found in her favour. He

⁴⁵ [1956] 3 W.L.R. 232, 235.

⁴⁶ *Ibid.*, 235; cf. *Bowie v. Shenkin*, 1934 S.C. 459.

⁴⁷ [1954] 1 W.L.R. 58.

⁴⁸ [1955] 1 W.L.R. 207.

held that she was an invitee, but he was satisfied that even if she was only a licensee the polish on the floor was a concealed danger. She was thus entitled to recover on conventional grounds for breach by the occupiers of their occupancy duty. But Finne-more J. went on to cite *Dunster v. Abbott* and to ask whether it mattered what the plaintiff was. After she had gone into the ward a wholly extraneous danger, no part of the property itself or of the structure, was introduced into the ward on the floor—the superadded polish. “The simple question,” he said, “seems to me to be, was that negligence? That is to say, was it negligent to leave that polish on the floor without giving a warning to a person walking on the floor?” The line between this and failure to warn of polish put on the floor before the licensee enters is a fine one and the duty seems nearer to the ordinary occupancy duty than to the sort of activity duty that Cockburn C.J. had in mind: such as the careless lowering of objects from cranes, or, in Denning L.J.’s example, the careless driving of a car, or for that matter the spilling of the tea from an urn in *Glasgow Corporation v. Muir*.⁴⁹

In *Riden v. Billings*⁵⁰ building contractors broke up part of a sloping paved ramp constructed over the original footpath and steps leading up to the door of a house used as offices. They removed the railings on each side of what was left of the ramp over the steps and barricaded one side only. The plaintiff, a guest of the resident caretakers, fell into the basement area as she was leaving. In the Court of Appeal the issue was limited to the liability of the contractors. The liability of the occupier was not in issue. In making this clear, and in stressing that such a contractor was under a general duty imposed by law to use reasonable care to prevent damage to persons whom he might reasonably expect to be affected by his work, Denning L.J. cited the decisions of Appellate Courts in *Clayards v. Dethick*,⁵¹ in which a contractor was liable to a cab-owner whose horse fell into a trench dug by the contractor while making a sewer; *Corby v. Hill*,⁵² in which a visitor to a lunatic asylum ran into an unlighted pile of slates left by a building contractor in a private road; *Kimber v. Gas Light & Coke Co.*,⁵³ in which the gas company made a hole in the floor of their customer’s house into which a visitor fell, and

⁴⁹ [1943] A.C. 448.

⁵⁰ [1956] 3 W.L.R. 704.

⁵¹ (1848) 12 Q.B.D. 439.

⁵² (1858) 4 C.B. (N.S.) 556.

⁵³ [1918] 1 K.B. 439; a case notable for Scrutton L.J.’s remark: “it was said there was no authority for this position, but, as Lord Macnaghten said, the plainer a proposition is the harder it often is to find judicial authority for it.”

Haseldine v. Daw,⁵⁴ in which a firm of engineers who negligently repaired a lift were liable to a visitor injured the next day when the lift fell to the bottom of the shaft. He also quoted Lawrence J.'s decision in *Brown v. Cotterill*⁵⁵ that a monumental mason who erected a tombstone negligently was liable to a child on whom it fell. All these cases⁵⁶ show, said Denning L.J., "that the duty of care is owed to all those whom the contractor may reasonably expect to be affected by his work whatever the capacity in which they come, whether as invitees or licensees or as other contractors."⁵⁷ This is unexceptionable, but he proceeds—

"The duty of care of which I have spoken is not confined to contractors. It is a duty which rests on anyone who does work on the land, including the occupier himself. If the occupier does work on his own land, he is under the same duty as a contractor. The reason is because the duty arises, not out of the fact of occupation but out of the fact that he is doing work which he knows or ought to know may bring danger to others: and that gives rise to a duty of care."

This again is unexceptionable if the work is a current operation carried on by the occupier *after* the visitor has entered, such as working a crane, shunting railway wagons or driving a lorry. But if the work done by the occupier consists of digging a hole or removing a hand rail *before* his visitor enters, his liability today must surely be for breach of his occupancy duty and must depend on whether his visitor is an invitee or licensee. Such an act by the occupier is not "superadded negligence" in Cockburn C.J.'s phrase; it is an act which has created an existing danger in the condition of the premises. It may be that Denning L.J.'s determination to demonstrate that the long-standing law of occupiers' liability has been altered to his own satisfaction without the aid of the legislature has resulted in the introduction of a new confusion between occupancy and activity duties. Although there will be little, if any, difference in the nature of these duties once the Bill becomes law, it may still be necessary to distinguish them. This is so because the Bill and any provision in it, whether its present form is amended or not, relating to exclusion of duty, will apply only to occupancy duties and not to activity duties as generally

⁵⁴ [1941] 2 K.B. 343.

⁵⁵ (1934) 51 T.L.R. 21.

⁵⁶ *Malone v. Laskey* [1907] 2 K.B. 141, in so far as it conflicts, is, in Denning L.J.'s view, founded on a fallacy and inconsistent with *Haseldine v. Daw* which should prevail; and *Ball v. L. C. C.* [1949] 2 K.B. 159 cannot be considered as of any higher authority than *Malone v. Laskey* itself.

⁵⁷ [1956] 3 W.L.R. 704, 709. And see *Davis v. St. Mary's Demolition Co.* [1954] 1 W.L.R. 592; *Creed v. McGeoch & Sons* [1955] 1 W.L.R. 1005; *Perry v. Thomas Wrigley* [1955] 1 W.L.R. 1164.

understood; and although *Ashdown* recognises that both occupancy and activity duties can be excluded by notice, it also recognises that words adequate to exclude the former will not necessarily exclude the latter; and again because the attitude of the courts is likely to be much less sympathetic to an occupier seeking to exclude an activity duty than to one excluding his occupancy duty. There is much to be said for an occupier who is prepared to grant a gratuitous licence provided he is not to be put to trouble or expense in inspecting and maintaining his property: there is less to be said for one who claims a right to shoot, drive, shunt or blast without taking reasonable care.

THE REMAINING DIFFICULTIES

Finally, there remain other aspects of the Bill, and of the *Ashdown* case, which can only be raised and not fully examined in this note. An occupier can by notice exclude his own liability whether for his own acts or the acts of his servants or contractors. Can a contractor by notice exclude *his* liability? The answer must surely be "no": he is not granting a licence to the plaintiff; the plaintiff is not agreeing with him; he is in the same position as the driver of a car carrying a placard denying liability. But can the occupier by notice exclude not only his own liability but that of his servants or contractors, so as to prevent action against them personally? *Cosgrove v. Horsfall*⁵⁸ is authority for replying again "no," unless a relationship of principal and agent can be established. If it cannot, then the servant or contractor cannot, it has been held, avail himself of an exclusion contained in a notice issued by his employer, as "he was not a party to the contract and did not grant the licence or impose the condition." This has been approved in *Adler v. Dickson*,⁵⁹ but Denning L.J. accepted, in that case, the possibility of a plaintiff (by reason of his agreement with the master), being *volens* in relation to the conduct of the servant, provided that the plaintiff has assented to the exemption of the servant either expressly or by necessary implication.

These difficulties have not been created by the Occupiers' Liability Bill, but the Bill does nothing to remove them. Despite the remarkable skill with which the draftsman has avoided the traps and concealed dangers into which the more ambitious Report might have led him, the writer of this comment still takes leave to pitch his tent in the camp of those who oppose codification and would be satisfied with specific limited amendment of the existing law.

⁵⁸ (1946) 62 T.L.R. 140.

⁵⁹ [1955] 1 Q.B. 158.

RES GESTA IN CRIMINAL CASES

(continued)

R. N. GOODERSON

ASSUMING that a *res gesta* situation has arisen, it may now be considered what forms the declaration may take. Presumably the declarant will not be held to all those niceties of speech which are exacted from a witness: a declaration will not be excluded because it asserts or denies the very fact to be determined by the court.⁸⁸ If in *Comm. v. Hackett* the deceased had said: "Dan Hackett has murdered me," it would have been as admissible as his actual statement that Hackett had stabbed him.⁸⁹ It is further submitted that the general rule excluding opinion evidence should similarly be relaxed in the case of a statement part of the *res gesta*. In some cases, an utterance that might have qualified for admission as part of the *res gesta* has been rejected as opinion.⁹⁰ But such a statement seems to have been received in *R. v. Palmer*, where Fisher was allowed to testify that at Shrewsbury, six days before his death, Cook said to him, about ten minutes after drinking a glass of brandy with Palmer and others, not merely that he had been very sick but also, despite the objection of defence counsel, that "that damned Palmer had dosed him."⁹¹ The reference to Palmer

⁸⁸ *Per* Cardozo J. in *Shephard v. U.S.A.* (1933) 290 U.S. 96, 101, dealing with a case of a dying declaration, but presumably the remarks apply equally to a *res gesta* statement.

⁸⁹ See note 32, Part I. It might in the hypothetical example be argued that it would be admissible as a dying declaration, in that it impliedly acknowledges that death is certain—see note 30, Part I.

⁹⁰ *Comm. v. Fugmann* (1937) 330 Pa. 4, 198 Atl. 99 (Pennsylvania)—Deceased, injured by bomb received through the post, said: "F. done this." Held inadmissible as mere conjecture. *Chapdelaine v. R.* [1935] S.C.R. 53 (Canada)—C. was charged with the murder of her husband by arsenic poisoning. His accusation was rejected as part of the *res gesta*, partly because the transaction was over (the statement was made in hospital two weeks after the alleged administration, and one week after his removal to hospital), and partly as mere opinion: *per* St. Germain J. at p. 68. The accusation was also rejected as a statement made in the presence of the accused, as the jury had not been directed on the *Christie* point—see note 24, Part I.

⁹¹ Bennett's S.H. Report, 26. Lord Campbell C.J. overruled the objection of Serjeant Shee, later Shee J., but not an experienced counsel in criminal causes: this was his second defence of a capital charge, and he admits he was only a substitute for the intended counsel who was ill: *ibid.*, 174. Sir Alexander Cockburn, later of *Bedingfield* fame, then Attorney-General, in opening for the Crown, stated that the words were not evidence: *ibid.*, 9. Stephen, a spectator at the trial, thinks them admissible on a ground not considered by the court—see note 4 (*infra*).

seems to have been based purely on conjecture. The general rule against opinion evidence is based upon two considerations, first that opinions in so far as they are based upon no evidence are worthless, and second that in so far as they are based upon legal evidence they tend to usurp the function of the tribunal whose province alone it is to draw conclusions of law or fact. As to the second reason, a declarant out of court cannot, as has been seen, be held to the same niceties of speech, and as to the first reason, it will largely be a matter of conjecture, where the declarant is not a witness, whether his utterance was based upon opinion or actual knowledge: no one can tell the grounds of his belief unless he happens to have stated them. The line between opinion and fact being largely one of degree,⁹² it seems that the better rule would be to regard such evidence as *prima facie* admissible, though liable to be rejected by the judge in his discretion if of little weight but likely to prejudice the accused gravely.⁹³

Evidence in the form of a writing is sometimes admitted under the head of *res gesta*. It is equally as receivable as oral evidence where it is used as a vehicle of communication to a witness by one who is speechless as in *State v. Morrison*,⁹⁴ or where it is not offered to prove the truth of the statements in the document as in *R. v. Podmore*.⁹⁵ There P. was charged with the murder of M., a garage proprietor, whose body was found near a car in a locked garage. On the car seat were found a receipt book from which a page had been torn, and an invoice book in a similar condition.⁹⁶ The Crown case was that the missing pages referred to bogus transactions which P. had induced M. to book, to entitle P. to commission in his capacity of M.'s servant. It was argued, on the basis of indentations in the first book and carbon copies in the second, that the missing receipt had borne P.'s initials. The prosecution story was that M. had discovered that P. was claiming commission on bogus

⁹² *Per* Learned Hand J. in *Central R.R. Co. of New Jersey v. Monahan* (1926) 11 Fed. 2d 212. See also *Elcomb Coal Co. v. Coffman* (1938) 113 S.W. 2d 847, 272 Ky. 93 (Kentucky), where a statement of a victim of an accident that his back was broken was accepted as an idiomatic exclamation part of the *res gesta*, though in the realm of expert opinion if literally accepted.

⁹³ It is noteworthy that Thayer would limit the general rule excluding opinion evidence to cases where, in the judgment of the court, it will not be helpful to the jury: (1898) *A Preliminary Treatise on Evidence at the Common Law*, 525. Approved by Cowen & Carter, *Essays on the Law of Evidence* (1956), 172.

⁹⁴ (1902) 64 Kan. 669, 68 Pac. 48 (Kansas) cited Chamberlayne, para. 3010 (1913). Three to five minutes after her throat had been cut, and her windpipe severed so that she could not speak, deceased wrote: "Jess Morrison killed me." Held admissible.

⁹⁵ (1930) 22 Cr.App.R. 36.

⁹⁶ Phipson (9th ed. 69, 130) says that these books belonged to the prisoner, the headnote that they belonged to the victim. Were Phipson correct it is submitted that the evidence would be still more cogent, as if, say, his visiting card were found at the scene of the crime.

transactions, and in the resultant altercation P. had killed him. The evidence was not offered as an exception to the hearsay rule, but as original circumstantial evidence based upon the unusual position of the books, the torn leaves, and the possibility, if the jury so believed, that an attempt had been made, by removing certain pages, to conceal P.'s association with M.⁹⁷ The only real danger lay not in the absence of any possibility of cross-examination, but in the chance that the evidence might have been planted by some third party, and this was not the line that the defence took, although there was a feeble attempt to suggest that a certain Maxton or Baxter had been with M. at the garage on the day of his death. In the attempt to exclude the evidence, it would have been open to the defence, while admitting that the physical conditions around the body of a homicide victim may always be proved as part of the *res gesta*, to question whether the prosecution had established that the situation had remained intact during the intervening period of over two months between M.'s death and the discovery of his corpse. On any view time is of importance in *res gesta* matters. The vital question was not of course when the documents were executed but when they were placed upon the car seat. Were they there when the fatal blow was struck? The prosecution had proved only opportunity apart from these documents, which as the trial judge said in his summing-up were the real strength of the Crown case. His Lordship warned the jury of the danger of relying upon the evidence of two convicts as to admissions by P. made to them in the prison exercise yard of complicity in the crime. There was thus little or no corroboration of the documentary evidence offered as *res gesta*. The defence counsel might have attempted to induce the court to accept the view already mentioned that *res gesta* evidence can be used only to corroborate.^{97a} It has been suggested above that there is no hard and fast rule to this effect, and it is better to hold the evidence admissible unless excluded in the judge's discretion, which ought to be invoked if the evidence is not sufficiently proximate.^{97b} That this is the better view is confirmed by this case. It would have been hard for the defence to suggest that the documentary evidence had been planted, as its implications against P. were not obvious, but paradoxically arose from the very absence of

⁹⁷ Hewart L.C.J., the trial judge, makes this last point in his summing up: *The Times*, March 10, 1930. He also admitted, despite objection, a letter from M. to Thomas, P.'s alias, making an appointment, and found near the body: *ibid.*, March 4, 1930. Before the C.C.A., Inskip for the Crown argued that this letter was not offered to prove the truth of its contents: *ibid.*, April 8, 1930.

^{97a} See n. 87, Part I.

^{97b} See n. 18, Part II (*infra*), though this deals primarily with the problem of the initiation of the transaction.

any reference to him in the documents. The Crown alleged that he had tampered with the documents to remove any references to him. Anyone fabricating false evidence would scarcely adopt the course of removing references to P., so that suspicion might fall on him. It would have been a travesty of justice to hold the evidence inadmissible on the ground that *res gesta* evidence can only corroborate.

Apart from situations such as those in *Morrison* and *Podmore*, it is submitted that considerable caution should be exercised in receiving documentary evidence as part of the *res gesta*. Such evidence is bound to be lacking in spontaneity, and cannot spring out of the transaction with something akin to inevitability, as is the case with some oral *res gesta* evidence.⁹⁸ As to time, the requirement of contemporaneity or substantial contemporaneity is not so likely to be satisfied. Suppose that in *R. v. Gilbert and Grant*⁹⁹ the hotel porter, who had been left bound and gagged, and who was ultimately suffocated in his efforts to get help, had contrived to leave some written message. There might well be no evidence as to the time when it was written, whereas with an oral communication the exact time can often be fixed.^{99a} A letter describing the writer's symptoms was rejected in *Witt v. W.*¹ No reasons are given, but it is suggested the ground of exclusion might well be that the addressee, unlike the recipient of an oral complaint, cannot observe the external effects for himself. He cannot see the ravages of pain on the declarant's face, or even the simple fact whether he is confined to bed in the daytime.² A factor not unlike this weighed with the Scottish court in the case of *Madeleine Smith*. There the diary of the victim, which contained entries indicating that he had seen the accused on two of the dates on which she was alleged to have administered poison to him, was excluded. One reason given was that from their very nature the entries were not intended for communication, so that there was no one who could interpret their meaning.³ It is submitted that since the opportunity of fabrication

⁹⁸ See *Tustin v. Arnold* (1915) 84 L.J.K.B. 2214, 2216, where Bailhache J. holds that for these reasons a written statement can never form part of the *res gesta* of a collision.

⁹⁹ (1954) 38 Cr.App.R. 107.

^{99a} United States courts reject statements tendered as *res gesta* if there is no evidence when the statement was made: *Salas v. Peop.* (1911) 51 Colo. 461, 118 P. 992; *Miller v. State* (1943) 168 S.W. 2d 864 (Tex.).

¹ (1862) 8 L.T. 175, 164 E.R. 1228. Cresswell J.O.

² As in *Aveson v. Kinnaird*, note 72, Part I.

³ (1857) 2 Irv. 641, 654. F. Tennyson Jesse, 151. The entries were also rejected on the grounds that there was a motive to misrepresent in that L'A., the deceased, sought to maintain his hold over S., his mistress, who was thinking of becoming engaged to a more eligible suitor (*sed qu.* how this end would be furthered by making false entries of meetings), that the entries were in pencil thus facilitating alteration and fabrication, that they might record past acts, and that there was no authority except *Patch*, a case that one of the judges faintly recalled as one where a letter from a murdered man was received. (In *R. v. Patch*, P. was charged with the murder of B. The

is greater, and that of interpretation by the witness smaller, more caution should be shown in admitting written, as opposed to oral, declarations, as part of the *res gesta*, at any rate where the writing is not made in the presence of the witness.

Statements accompanying an act occupy a special position, for if the act is independently admissible, so is a statement made contemporaneously that elucidates the act. Wigmore calls this the Verbal Act doctrine. Stephen thus justifies the reception in *Palmer's* case of Cook's remark to Fisher at Shrewsbury when handing him £700. This act was independently relevant to show that Cook was possessed of large sums of money, providing a motive for the debt-ridden Palmer to dispatch him. This let in Cook's damaging remark accompanying and explaining the delivery: "That damned Palmer has been dosing me."⁴ It is on this ground that Stone justifies *R. v. Edwards*,⁵ where at the trial of E. for murdering his wife with a poker, W. testified that a week before her death Mrs. E. deposited a carving knife and a large axe with her, saying that E. always threatened her with them, and she felt safer when they were out of the way. But the deposit *per se* had no relevance to the ultimate death, and while a declaration can elucidate a relevant act, it cannot render relevant an act on the face of it irrelevant.⁶ If on the other hand the statement as to previous threats by E. is regarded in isolation, it cannot be admitted as it relates to past threats, and the transaction which leads to the demise of the declarant has not yet begun.⁷

alleged motive was that on the day of the crime P. had to pay a debt to B. for which he was pressing, and that P. had no money. P.'s case was that he owed nothing to B., and was already his partner. Mrs. B. produced documents, executed two months before, *ex facie* showing the purchase by P. of B.'s stock in trade, and a letter from B. to P. promising to try to secure a renewal of the lease of the business premises in P.'s favour: (1806) Gurney's S.H. Report 101-102. The Crown argued that these documents did not relate to a genuine transaction, but were intended to protect B. from his creditors should they press him more successfully than of yore (B. had been made bankrupt two years before): *ibid.*, 184. The evidence point is not discussed: the receipt would be admissible as a declaration by B. *prima facie* against his interest.)

⁴ See note 91, Stephen, *History of the Criminal Law*, 394, and Stephen, *Introduction to the Indian Evidence Act*, in Woodroffe and Ameer Ali, *Indian Evidence Act*, 9th ed. 54, 56. The relevant section in the latter Act is s. 8, explanation 1. ⁵ (1872) 12 Cox 230.

⁶ Stone ((1939) 55 L.Q.R. 74) accepts the principle that the act must be in issue or relevant, and cites Coltman J. in *Wright v. Tatham* (1837) 7 A. & E. 361 for the proposition that the union of an irrelevant act and an inadmissible declaration cannot render them admissible. Yet surely the act was in itself irrelevant (Phipson, 9th ed., 78), and the declaration by itself was inadmissible and could not make the act relevant.

⁷ Previous threats could be proved by witnesses who heard E. utter them, but Mrs. E.'s declaration was contemporaneous neither with the threats nor with the ultimate assault. A declaration of a victim substantially contemporaneous with one attempt to poison has been used as a *nexus* between that and a previous attempt: *Lamson* (note 85, Part I), but that ruling cannot apply here.

THE BEGINNING OF THE STORY

THE question then arises of fixing the point of time when, for *res gesta* purposes, a transaction is deemed to begin. The difficulties of the problem do not seem to have been appreciated in the cases, or in writings, but it is suggested that the question is at least as important as the much agitated one of the moment of completion of the transaction. The law is clear that a statement may come within the *res gesta* principle though it precedes the actual completion of the crime. American courts have received declarations immediately preceding the completion such as: "Look! there is Uncle Isaac and Uncle Jesse going to shoot us,"⁸ and "Alley Means is outside there fixing to shoot me; I am afraid he is going to shoot me right here in the church."⁹ No doubt in these cases it was perfectly plain to the declarant that the transaction was about to begin, and his apprehension was justified by the direct and unequivocal methods immediately employed, but it is not always so easy to say whether the transaction has begun, and in this connection as in the case of the end of the transaction lapse of time is a vital factor. It is submitted that generally speaking a so-called *res gesta* declaration is not sufficient uncorroborated evidence to prove the initiation of the transaction, unless it immediately precedes the act charged, and in normal cases the judge should exercise his discretion and reject such evidence. The beginning of the transaction was heralded by an alleged *res gesta* statement in the poisoning trials of Lamson and Palmer, but in both these cases there was corroborative evidence before the jury. In the first case the Crown, to prove a December poisoning, sought to establish an attempt on the same victim in August. Here the prosecution produced not only the December declaration by the victim as to his feelings after an August pill, but evidence that L. obtained poison near the August date, and visited the victim, who shortly afterwards was taken ill. In the second case it was sought to prove that P. weakened his victim C. by a dose of antimony at Shrewsbury on the 14th before finishing him off at Rugeley by administering strychnine on the 19th and 20th, but proof of the first dose was not confined to C.'s complaint to Fisher¹⁰: there was evidence that C., formerly in good health, suddenly became very sick, that as he drank the brandy he complained that it burnt his throat dreadfully, and that a witness

⁸ *Shirley v. State* (1906) 144 Ala. 35, 40 So. 269. Prosecution for assault with intent to kill. Declaration by child of victim as wife of victim opened the door.

⁹ *Means v. State* (1881) 38 Am.Rep. 640. Prosecution for murder. Deceased made this statement as he was sitting in church looking out of the window. He at once went to the door, and the fatal shots were fired.

¹⁰ See n. 4, Part II.

had previously seen P. in the passage outside the hotel sitting-room shared by P. and C., behaving suspiciously with a tumbler containing liquid.¹¹ Where there is strong corroborative evidence, the *res gesta* declaration itself is sometimes excluded. It is suggested that this is because there is always considerable doubt as to the scope of *res gesta*, and a judge, who feels that the prosecution has produced sufficient evidence of guilt apart from the declaration, will reject it, lest any conviction that may result may be quashed on appeal for the admission of inadmissible evidence.¹² At the other end of the scale, where there is no evidence whatever that the transaction has begun, other than the declaration offered as part of the *res gesta*, caution is also required, and probably explains the ruling in the Tanganyika case of *R. v. Alice Ghaui*.¹³ There G. was charged with the murder of her husband. After evidence that death was due to arsenic, and that G. had the opportunity to administer it, the Crown sought to prove by the evidence of Mrs. P. that three days before the death, Mrs. P., seeing an African boy with a basket loitering outside her house, looked into it and saw some roots and a bottle of green liquid. She picked up the bottle, and the boy told her it was poison for someone who wanted to kill a dog. A few minutes later G. drove up, and Mrs. P. saw the boy hand her the basket. G. then drove away. She had no dog. The Crown sought to prove this under sections 6 and 8 of the Indian Evidence Act, two of the *res gesta* sections. The court rejected it, as it bore no immediate relationship to the litigated act. It is submitted that this declaration was not firm enough ground on which to ask the court to hold that the transaction had begun. It was not a statement of the victim or of the accused, but of a third party who was not shown to have any connection with the delivery of the bottle other than that of messenger.¹⁴ In

¹¹ Evidence of Anne Brooks: (1857) Bennett's S.H. Report, 53. Also in *R. v. Barlow* (see n. 40, Part I), apart from S.'s sarsaparilla declaration there was evidence that S., formerly in good health, had suddenly become ill, that B. had just visited her and that he had poison in his possession at his lodgings.

¹² Cockburn C.J. conceded that one of the reasons that induced him to reject the *Beddingfield* declaration was this consideration: 15 L.J. 18. It may be the underlying explanation of *R. v. Sales* (1936) S.R. 55. S. was charged with the murder of D., his landlady. S. knocked on D.'s door. D. spoke to him, and then returned inside, where she spoke to L., her paramour. Three minutes later S. again knocked. D. came out and went with S. to his room thirty yards away. They talked for a few minutes, and then a rifle shot was heard. L. came out, and found D. lying shot, and S. holding a rifle. The High Court of Southern Rhodesia refused to allow L. to testify as to what D. said to him after answering the first knock. ¹³ (1946) 62 L.Q.R. 226.

¹⁴ In the U.S.A., at the trial of H. for murder, the testimony of a witness, proffered as *res gesta*, that he heard a scream, and about three minutes after, a woman came to him, and asked for help, saying that H. was killing a man and his wife, was rejected as not at the scene of the homicide, nor in sight or hearing of the accused or victim, and not spontaneous: *Halfrich v. State* (1936) 165 So. 285.

dealing with the end of the transaction, the danger of question begging arguments has been mentioned.¹⁵ There is even more danger of such arguments where the beginning of the story is concerned. In *Ghani's* case the only evidence that the transaction has started is the declaration offered as *res gesta*. It is evidence only if it is part of the transaction. How can the question of admissibility be decided without at the same time deciding that the evidence indeed proves the fact for which it was offered, *i.e.*, that G. obtained from the boy a bottle that she believed to contain poison?¹⁶ A case in which it seems the court failed to show due caution regarding a statement at the beginning of the story is *R. v. Hill*,¹⁷ where H. was charged with larceny from his master. His defence which emerged in his cross-examination of C., a fellow-servant and prosecution witness, was that C. had deliberately misled him into dispatching sugar instead of the cement ordered. In re-examination, C. was allowed to testify that about a week previously H. had asked him to help steal other property of the master, the proceeds to be spent on a public holiday fixed for a date a week before the offence charged in the indictment. The court admitted the evidence as part of the *res gesta*, though uncertain whether it could be admitted to show intent as part of a system, or as tending to negative the explanation of innocent mistake. In other words, the court was not prepared to admit the evidence as similar fact evidence, though this seems to be the only conceivable basis for its admission as *res gesta*: it could not be considered as preparation for the later offence as it was to be completed and the ill-gotten gains spent a week before. There is the further point that even if the declaration is admitted on

¹⁵ See n. 57, Part I.

¹⁶ The same considerations may apply to a statement made at the end of the transaction—see the similar dilemma facing Cockburn C.J. (n. 59, Part I). The difficulty stems from the very nature of *res gesta* evidence, but should not inevitably lead to the view that such evidence is admissible only to corroborate or explain, even where sufficiently proximate. It is submitted that in *State v. Bussey* (1926) 110 So. 626 (Louisiana) the court laid down too wide a proposition. B. was charged with murdering her child aged five with mercury poison. It was proved that the child died of this poison, but the only evidence against B. was a declaration by the child to a hospital nurse, twenty-eight hours after the alleged administration, that her mother had made her eat soap on toast bread, and it tasted nasty. The evidence was rejected on the ground that it was the only part of the transaction that was proved at all, and that it was proceeding in a circle to use the declaration as proof of facts necessary to constitute the declaration part of the *res gesta*. The exclusion was amply justified on the facts: the statement was made far too long after the transaction, and though it is not an absolute bar to *res gesta* evidence that it comes from one probably too young to be a witness (see *Thomas v. State* (1905) 47 Tex.Cr.Rep. 534, 84 S.W. 823), this factor would give any court pause in the absence of corroboration. But it is submitted that had some such statement come from an adult victim at the first moment that he began to feel ill it would have been admissible.

¹⁷ (1908) 1 Cr.App.R. 158 (Court of Criminal Appeal).

a similar fact basis, it is the only evidence of the previous similar occurrence, and should, it is submitted, be received with caution.

It is believed that the acceptance of the proposition that normally a *res gesta* declaration is not sufficient uncorroborated evidence to prove the initiation of the transaction, unless it is sufficiently proximate, will explain the criminal cases, regarded by Phipson as in conflict,¹⁸ where declarations as to future intent have sometimes been accepted, sometimes rejected. The test of proximity is fully intended to be a vague one, giving scope for what is believed to be the solution of difficult *res gesta* problems—the discretion of the judge. The difficulty is not unlike that in conspiracy cases, where the rule of evidence is that the acts of conspirators in furtherance of the common design are admissible against their colleagues, but it is not easy to determine at what stage the judge will pronounce that there is sufficient *prima facie* proof of a conspiracy.¹⁹ In *R. v. Jessop*,²⁰ where J. was charged with the murder of A. following a suicide pact, a declaration by A. of intent to commit suicide was received, partly because the Crown case was based upon conspiracy to commit suicide, and therefore, subject to the difficulty just mentioned, there was no obstacle.²⁰ Also there was corroboration in the act of A. in buying laudanum, the poison used. Finally the declaration, though tendered by the prosecution, was used by the defence to prove that A. intended to commit suicide months before he spoke to J. Where both sides want the evidence, it is likely to be admitted. Another case admitting a declaration of intent is *R. v. Buckley*,²¹ where B. was charged with the murder of G., a police constable. A statement by G. to his inspector at 11.30 one morning, two days before his body was found, that he intended to watch B. at dusk as he was at his old game of thieving, was admitted. This case has to be contrasted with *R. v. Wainwright*,²² where W. was charged with D.'s murder, and D.'s statement on leaving home that she was going to W.'s house was rejected. It was sought to bring in the statement of intention as one accompanying an act, but Cockburn C.J. rejected it as one which might or might not have been carried out: she would have gone away under any circumstances. In neither case was there any evidence that the transaction had begun except the declaration itself. In *Buckley* the declaration was, it is submitted, more proximate, and was rightly admitted, whereas

¹⁸ *Op. cit.*, 82.

¹⁹ The point is well made by Kenny, *op. cit.*, 343, n. 9.

²⁰ (1877) 16 Cox 204, 205: "The acts and words of the deceased in carrying out a pre-arranged plan were evidence against J."

²¹ (1873) 13 Cox 293. No reasons are given. It was also admitted as a declaration by a deceased person in the course of duty.

²² (1875) 13 Cox 171.

in *Wainwright* it was too remote. Had D. said that she was going to W.'s, and if she did not return within a certain time, would the witness inform the police, the statement would then have been *ex facie* a serious one, at any rate if so interpreted by the hearer,²³ but in the actual case the intention might or might not have been carried out.²⁴ Declarations by the deceased of intent to commit suicide are often tendered as defence evidence in murder charges, and sometimes received as in *R. v. Cowper*,²⁵ although this old case is of doubtful authority: the declaration was made as long ago as five months before the death, at a time when the transaction could hardly be said to have begun.²⁶ Surely the declaration was too remote in time to initiate the transaction. But to take a hypothetical case, where A is charged with B's murder, and seeks to prove an entry in B's handwriting in the family Bible, in which B had been wont to record the birth and death of members of his family. Against the date of B's death, is an entry opposite his name: "God forgive me, a suicide." Apart from any question of its admissibility as a dying declaration,²⁷ it is submitted that such an entry would be sufficiently proximate and colourful to be receivable as part of the *res gesta*. A more difficult case is *R. v. Thomson*,²⁸ where on a charge of using an instrument to cause an abortion on D., since deceased, a statement by D., a month before, that she was going to operate on herself was rejected, on the ground that nothing was at the time being done to her. The court considered only the doctrine of statements accompanying acts, as T.'s counsel had relied on *Edwards (supra)*. The court also emphasised

²³ See *Ghauri*, n. 13, Part II at p. 228, where one reason given by the judge for rejecting the boy's statement is that it might have been facetious. In the latter category seem to fall two declarations rejected as *res gesta* in U.S. street accident cases:—*Lee v. Houston Electric Co.* (1941) 152 S.W. 2d 379—by a bystander: "Well, boy, you tore up a good street car." *Smith v. St. Louis Ry. Co.* (1938) 123 S.W. 2d 198—by a motorman after collision with a taxi: "This is one damn good way to get rid of the cabs."

²⁴ In most American states, declarations of the *Wainwright* class are received on the principle of *Hillmon's Case* (1892) 145 U.S. 285, but in some only if they accompany an act as in *Wainwright* itself: *Comm. v. Palma* (1920) 268 Pa. 434, 112 Atl. 26. Wigmore ridicules the latter limitation in (1913) 8 Ill.L.R. 204. Chafee ((1924) 37 Harv.L.R. 513, 520) considers that *Lloyd v. Powell* [1914] A.C. 733 (H.L.), admitting declarations of mental state to prove a *previous* act of procreation, is hard to explain in view of cases like *Wainwright*, rejecting declarations of intention to prove a *subsequent* act.

²⁵ (1699) 13 How.St.Tr. 116–119.

²⁶ The American states that do not accept *Hillmon's* case require a declaration to be accompanied by an act, as in *Nordgren v. People* (1904) 211 Ill. 425, 71 N.E. 1042—murder trial—defence suicide—the deceased kept whisky and poison in her room, and confessed that her inability to control her appetite for drink worked upon her spirits and depressed her. See also *Jessop (supra)*, n. 20, Part II—remarks accompanying the purchase of laudanum.

²⁷ *Quaere* whether a person about to commit suicide can be said to be under a settled hopeless expectation of death.

²⁸ [1912] 3 K.B. 19 (Court of Criminal Appeal).

that the rules of evidence are not to be strained in favour of the defence. It is, however, submitted that the defence has an advantage over the prosecution in that admissible evidence tendered by the defence is never rejected as prejudicial: the doctrine of the court's duty to reject evidence *prima facie* admissible in certain circumstances, that received its first full expression in *D.P.P. v. Christie* (*supra*), has never been applied against the defence. It is also suggested that the rule proposed above that a so-called *res gesta* statement should be rejected if its admission involves assuming the question, should be applied only to evidence tendered by the prosecution. It is the effect prejudicial to the accused that requires that the jury should not receive the impression that the judge has already decided the main issue by admitting the evidence, whereas if the evidence is offered by the defence and a statement telling in favour of the accused is received, there is not the same reason why the jury should not nevertheless find the accused guilty, if on balance they consider the case to be proved, for they should be in a position to ponder, without prejudice, any warning the judge may have given as to evidence proffered as part of the *res gesta*, but of doubtful admissibility. Ignoring these considerations, that may operate in favour of the defence, it is still arguable that the evidence of the previous declaration, rejected in *Thompson*, should have been received. Bearing in mind the view of Lord Moncrieff that the transaction may begin or end at a different time from the point of view of different parties to it,²⁹ while there was as yet nothing to connect T. with the transaction at the time when D.'s statement was made, nevertheless from the point of view of the declarant herself, the transaction had already begun, quite apart from her declaration: she was pregnant, presumably unmarried, and no doubt considering the problem of disposal of the unwanted child, because whether the prosecution or the defence story be accepted, in either view, the foetus was in fact disposed of. The view of Lord Moncrieff seems to be a particularly compelling one, where the commencement of the transaction is in question, and even where all that the defence has to offer in support of its submission that the story has begun is a mere declaration on the part of the alleged victim. Surely an accused charged with unpremeditated murder cannot be precluded from proving that the previous day the deceased threatened to commit suicide on the ground that the alleged transaction had not yet begun. Similarly it has been held in the United States that a prisoner charged with murder may prove as part of the *res gesta* threats of personal violence

²⁹ See n. 80, Part I.

made by the deceased against him though not communicated to him, on the question who was the aggressor.³⁰

Res gesta declarations may now be classified from another point of view to examine whether there are any special features that characterise statements of the alleged victim, statements of the accused or statements of third parties respectively.

STATEMENTS OF THE ALLEGED VICTIM

* Most of the cases already considered have involved statements by the alleged victim, and it will suffice to summarise some of the propositions already made in detail, remarking, however, that most of these propositions are not confined to statements of victims, but are of general application, though particularly likely to apply to such statement.

1. A statement is admissible if made when the accused is in pursuit but out of earshot, even though he has already completed the criminal act with which he is charged.
2. It is submitted that in accordance with Thayer's view, a statement made in the absence of the accused and when all action on his part has ceased should be admissible, provided that such action has only just ceased.
3. Whether the view of Thayer or that of Cockburn is accepted, a statement should be admitted that is made in the course of a continuous transaction, or, in a case where the criminal consequences have been brought about by an indirect method, a statement made immediately those consequences begin to manifest themselves.
4. A statement as to present symptoms is admissible.
5. A statement as to past symptoms and their cause is admissible, where the transaction is continuous, or where the statement serves to connect two similar but isolated incidents even though separated by an interval of some considerable time.
6. A declaration of future intent is admissible if sufficiently proximate, provided that there is corroborative evidence that the transaction has begun so far as the declarant is concerned.
7. A statement accompanying a relevant act is admissible if the act is equivocal and the statement explains it.

STATEMENTS OF THE ACCUSED

STATEMENTS of the accused if incriminating will be admissible as confessions, apart from any reference to *res gesta*, unless the confession

³⁰ *Burns v. State* (1873) 49 Ala. 370; *Pitman v. State* (1860) 22 Ark. 354; *People v. Cellura* (1939) 284 N.W. 643.

has been obtained by an improper inducement, or in breach of the Judges' Rules. The question whether a statement inadmissible as a confession can be introduced as a *res gesta* statement does not seem to have been raised in England. In Texas a confession which, under the rule prevailing in that and some other states, would have had to be rejected as made while under arrest,³¹ was received as part of the *res gesta* in *Powers v. State*,³² a murder charge. A. gave evidence for the prosecution that P. fled on horseback, that A. pursued him, and in five minutes overtaking him told him to hold up or he would kill him. P. stopped, and A. said he must come back to town with him, and accused him of killing the deceased. P.'s reply, that if he did no one saw him, was admitted as part of the *res gesta*, though otherwise inadmissible as made when under arrest and in fear of death. In India on the other hand, where section 25 of the Evidence Act forbids the proof of confessions to a policeman, it has been held that such a confession cannot be admitted under section 8, one of the *res gesta* sections.³³ This decision was, however, mainly based on the maxim of statutory interpretation—*generalia specialibus non derogant*: the rule of exclusion is laid down in section 25, and an exception is provided in section 27 as to facts discovered in consequence of the confession, based on English cases like *Gould*,³⁴ and the exception was held incapable of extension to cases not falling within it. This conclusion, though *obiter*, is undoubtedly correct for India, but in England it is submitted that in such a case the *res gesta* principle performs its customary function of overriding an exclusionary rule, and renders the evidence admissible, unless the court should see fit to exercise its paramount duty of discretion, and reject it as having little weight in comparison with the prejudice likely to be created.

If the previous statement of the accused is self-serving, it is generally excluded under the rule against self-corroboration, unless admissible as part of the *res gesta*. The court in *Griffin v. State*³⁵ explain the importance to the accused of bringing such a statement before the jury. There G. was charged with murder, and sought to prove that immediately on leaving the house where the blow had

³¹ *Layton v. State* (1908) 107 S.W. 819.

³² (1887) 5 S.W. 153, 23 Tex.App. 42. See also *Bronson v. State* (1910) 59 Tex.Cr. 17, 21—"Res gesta is independent, superior to, and cannot be restricted or limited to the rules relating to admissions or confessions made after arrest." *Bryant v. State* (1951) 244 S.W. 2d 662 (Tex.); *Head v. State* (1870) 44 Miss. 731; *Tillison v. State* (1946) 27 So. 2d 43 (Alabama); *State v. Carter* (1954) 275 P. 2d 847 (New Mexico).

³³ *Q.E. v. Nana* (1889) 14 Bom. 260. High Court of Bombay (Full Bench).

³⁴ (1840) 9 C. & P. 364.

³⁵ (1899) 76 Am.S.R. 718. Court of Criminal Appeals of Texas.

been struck five minutes before, he said to B. and W.: "I hope I haven't hurt him much. I did not think the glass was heavy enough to knock him down. I just wanted to keep him from kicking any more."³⁶ B. and W. testified to this statement, and to the fact that G. was still much excited and frightened. The court said it was true that G. had in his own testimony stated those facts, but this would be a mere statement of fact long after the homicide, after time for deliberation, and would not have the same effect with the jury as if it were part and parcel of the transaction, springing out of it at the time. It does seem that the accused should have any advantage that may come from having stuck to the same story from the very beginning, for he sometimes comes under severe comment from the judge in his summing up for failure to disclose his line of defence until a later stage.³⁷ Yet unless he is charged with recent fabrication, his early version of the affair can come in only under *res gesta*, or as in *Barney* through the kindness of the prosecution, who there produced as a witness Dr. D., summoned by Mrs. B. soon after the fatality, but who arrived about an hour after, too late for Mrs. B.'s statement to him to be part of the *res gesta*. Dr. D. gave Mrs. B.'s version of the affair—that she was threatening the deceased with what would happen if he left her, when she would commit suicide, and the revolver went off in the ensuing struggle. This was the story she adhered to throughout, and in cross-examination of the doctor, her counsel was able to elicit the opinion that she was still in such a state of frenzy as to be incapable of making up a story.³⁸

STATEMENTS OF THIRD PARTIES

Statements of third parties, like self-serving statements of the accused, come under the ban of the rule against self-corroboration, unless a part of the *res gesta*, even if the declarant also gives evidence in the witness-box, and also face exclusion as hearsay if he is not produced.³⁹ The leading case where the declarant also testified on oath is *R. v. Fowkes*,⁴⁰ although the evidence seems to have been admitted without objection. There one night members of the Fowkes family and Cooper, a policeman, were sitting in a room the window of which was closed but not shuttered, when William F. hooted: "There's Butcher." Immediately a shot came

³⁶ Cockburn C.J. would reject. Perhaps a little too late for Thayer.

³⁷ *R. v. Littleboy* [1934] 2 K.B. 408.

³⁸ *The Times*, July 5, 1932.

³⁹ e.g., *Gibson* (n. 28), *Teper* (n. 50), *Khijiruddin* (n. 86), Part I.

⁴⁰ *The Times*, March 8, 1856.

through the window, killing one of those inside. At the trial of F., who had been a butcher and was known as such, William F. testified that he had seen F.'s face at the window on the fatal night, and had hooted: "There's Butcher." Cooper also testified that though he did not see the face, not being in such a good position, William F. did indeed make the alleged hoot. The evidence of identification was vital, as the only other evidence against F. consisted of expressions of ill-will and footprints outside the house. There is no doubt that the evidence of the identification on the very night of the murder was far more likely to impress the jury than the bare statement of William F. at the trial that he had seen Butcher's face at the window just before the shot.⁴¹ Stephen makes the extraordinary comment that it could not be admissible on the ground that it was said in the accused's presence as the window was closed.⁴² It is submitted that even had the window been open and the house fitted with amplifiers the statement would still be inadmissible under this head. F.'s defence was that he was at home at the time of the shot. It is assuming the very question the jury has to decide to admit the statement on the ground of the accused's presence, for then *cadit quaestio*. Statements in the presence of the culprit are admitted in so far as he is considered to accept them by his silence.⁴³ Suppose William F. had made a mistake, and in fact the man at the window was Baker. He hears the hoot of "There's Butcher." Will he be likely to pause and say: "You're wrong. It's Baker"? Surely he will escape as quickly as possible before the mistake is rectified.

Another situation where a *res gesta* statement of a third party may be very important is where the previous declaration is retracted at the trial. Generally speaking a previous inconsistent statement, retracted at the trial, concerning a fact in issue is no evidence of that fact.⁴⁴ It is not open to the jury to choose between the two, even where the previous statement was made on oath, *e.g.*, at the police court, and there was opportunity for the accused to cross-examine.⁴⁵ The rule has been criticised by Dr. Glanville Williams,⁴⁶ and by Professor Morgan, who demonstrates that some American courts are prepared to admit the prior statement for its full value,⁴⁷ but in England the rule of exclusion is definite and regularly

⁴¹ Stephen, *Digest of the Law of Evidence*, 12th ed., 8.

⁴² *Ibid.*

⁴³ See n. 24, Part I.

⁴⁴ *R. v. White* (1922) 17 Cr.App.R. 60; *R. v. Dibble* (1908) 1 Cr.App.R. 155.

⁴⁵ *R. v. Birch* (1924) 18 Cr.App.R. 26; 93 L.J.K.B. 385.

⁴⁶ *Proof of Guilt*, 145-146.

⁴⁷ (1948) 62 Harv.L.R. 192-196.

followed.⁴⁸ The rule may have unfortunate effects: the various *Comer* trials, for and against Jack Spot, suggest that witnesses in fear may retract prior identifications of gang leaders.^{48a} It is submitted that *res gesta*, the much abused dustbin,⁴⁹ can be used to salvage something of value in certain situations. Suppose that the accused in *R. v. Fowkes* (*supra*) had been a powerful gang leader, and William F. at his trial had retracted his previous hoot, and denied that he had ever identified the accused, then it is suggested that P.C. Cooper could prove the hoot, or if there had been no witness to the hoot, a deposition by William testifying to his identificatory hoot could be proved and received as part of the *res gesta*.

In conclusion something may be said of the dangers of admitting *res gesta* evidence. Where the actual declarant is not under oath, or subject to cross-examination, there is the danger of faults in perception by the hearer and that his memory may be at fault.⁵⁰ There is the danger arising from talking it over.⁵¹ There is the possibility of perjury, as in the case of all evidence.⁵² The evidence, like any other circumstantial evidence, may be entirely misleading, as in the case cited by Sir Matthew Hale, where a niece was heard to cry out: "Good uncle. Do not kill me." The uncle was heir to his niece, and when she did not appear was charged with her murder, and executed, whereupon the niece reappeared.⁵³ Material and decisive it often is, as Cockburn

⁴⁸ This rule was *not* infringed in the case of *John Williams* by Channell J. at Lewes Assizes in 1911, or by Lord Alverstone in the C.C.A. Sir Patrick Hastings, counsel for the accused, makes a completely unwarranted attack upon the L.C.J. in *Cases in Court*, 303, which unfortunately receives some support from Dr. Glanville Williams, *op. cit.*, 146, n. 5, where the case is cited as *Power* (in fact the name not of the accused but of the main prosecution witness). There F.S., Williams' mistress, made a statement at the police court implicating him, but withdrew it at the trial. Hastings argued that it was not evidence, and accuses the L.C.J. of making no reference to the point in his judgment. In fact the case is reported ((1913) 8 Cr.App.R. 133), the matter is dealt with at length, and the court accept the position that as F.S. did not wholly withdraw her evidence at the police court, but simply said that the events described by her occurred on the 8th, and not on the 9th, the day of the murder, as she had previously said, it was open to the jury to decide that the events she described occurred on the 9th.

^{48a} The retraction may also be due to gangsters' "honour": *R. v. Fraser and Warren*, *The Times*, November 6, 1956.

⁴⁹ So described by Cowen and Carter, *op. cit.*, 4.

⁵⁰ On such dangers of hearsay evidence in general, see Morgan, (1948) 62 Harv. L.R. 177.

⁵¹ See *R. v. Leland* (1951) 11 C.R. 152, 160. The chambermaid's report of Cook's statement to her after his night of agony, at the trial of *Palmer*, was more damning to Palmer than her evidence before the Coroner: she may well have been induced by the strong public feeling against the accused to improve upon her original version. See Bennett's S.H. Report 47, and comment of Serjeant Shee for the defence: 204.

⁵² *R. v. Cash*, *The Times*, August 23, 1875.

⁵³ Cited *Palmer*, *Notable British Trials*, 291.

admitted Mrs. R.'s famous statement to be.⁵⁴ *R. v. Lamson* is an excellent illustration of this. The *Daily Telegraph* in its issue of December 5, 1881, reporting the death of the schoolboy two days before, said: "Before his death the deceased made a statement which has caused grave suspicions."⁵⁵ This is clearly a reference to the deceased's remark that he felt like he did after his brother-in-law had given him pills at Shanklin.

As has been indicated from time to time in the course of this article it is suggested that the best way to deal with this dangerous but necessary weapon in criminal cases is a fairly wide rule of admissibility, more generous than that laid down by Cockburn, but avoiding the excesses of Wigmore and Stone, in fact some such rule as that laid down by Thayer, perhaps the greatest writer upon evidence of all time. Within those limits the defence will have complete freedom of movement, but the prosecution will be restrained by the discretion of the trial judge to exclude evidence otherwise admissible, which is slight in weight but calculated to create undue prejudice against the accused. This doctrine of the discretion of the trial judge, which seems to be no older than *Christie's* case (1914), and was hotly denied by the Earl of Halsbury in that very case,⁵⁶ seems to be playing an ever widening part in the criminal law of evidence, not merely in branches of the common law of evidence,⁵⁷ but even rationalising statutes on evidence whose provisions might otherwise create undue prejudice by their too rigid enforcement.⁵⁸ It certainly appears that the sphere of *res gesta* evidence is one in which this doctrine of discretion can operate with maximum effect and benefit.

⁵⁴ 15 L.J. 5.

⁵⁵ Notable British Trials, 157.

⁵⁶ (1914) 10 Cr.App.R. 141, 148.

⁵⁷ *Harris v. D.P.P.* [1952] A.C. 694 (similar fact evidence).

⁵⁸ *R. v. Jenkins* (1945) 31 Cr.App.R. 15 (suggestion that where the accused has, under s. 1 (f) (ii) of the Criminal Evidence Act, 1898, laid himself open to proof of previous convictions by attacking the character of the prosecution witnesses, Crown counsel should first ask permission of the court before seeking to prove such convictions, and the court may reject the evidence even if it considers it *prima facie* admissible).

THE REVIVAL OF EQUITABLE ESTATES IN THE SEVENTEENTH CENTURY: AN EXPLANATION BY LORD NOTTINGHAM

D. E. C. YALE

THE ARGUMENT

THE purpose of this article is to give an explanation reported by Lord Nottingham about three-quarters of the way through the seventeenth century of the legal reasons justifying the resurrection of equitable estates by way of trusts after the Statute of Uses in 1535¹ had gone a long distance towards extirpating equitable estates in land. This explanation turns to a large degree on a restrictive interpretation of the first section of the Act, which is as follows—

“That where any person or persons . . . at any time hereafter shall . . . be seised, of and in any . . . hereditaments, to the use confidence or trust of any other person or persons or of any body politic, by . . . any . . . means whatsoever, . . . in every such case all and every such person or persons and bodies politic that . . . shall have any such use confidence or trust . . . shall . . . be . . . deemed and adjudged in lawful estate seisin and possession of and in the same . . . hereditaments, . . . to all intents constructions and purposes in the law, of and in such like estates as they had or shall have in use trust or confidence of or in the same.”

This means that after 1535 where freehold land had been or was in future conveyed “to B and his heirs to the use of C and his heirs,” C took the legal estate and B nothing. Eventually, as is well known, it came about that when it was wished to give an equitable interest to C, it was sufficient to grant the freehold “to A and his heirs to the use of B and his heirs to the use of (and in trust for) C and his heirs.” It is commonly said that this remarkable development depends upon a dogmatic rule of law that a valid use could not be limited upon another use and that the second use in C’s favour was therefore void and consequently unaffected by the Statute, but later the Chancellor decided to enforce the gift to C as a trust. This formula is later

¹ 27 Hen. 8, c. 10.

compressed into the limitation of a gift "unto and to the use of B and his heirs in trust for C and his heirs" and gives the same result. It is with this in mind that Lord Hardwicke later said that the only effect of the Statute was to add a few words to a conveyance.² Thus the Chancellor in substance and in equity recognised the second use, though it was usually labelled as a trust. Calling it a trust, on this view, is only a convenient way of distinguishing an interest not affected by the Statute from one that was; otherwise uses and trusts were substantially the same. To the natural question why did the Statute now stop at B's interest which it turned into a legal estate, why did it not now operate a second time to execute the recognised use or trust limited in C's favour, no satisfactory answer is given in the books.³ Why should it not operate along a whole series of uses or trusts limited in this way till it lodged the legal estate in the donee last designated? Or why should it [not] operate but once on a gift "unto and to the use of B and his heirs in trust for C and his heirs,"^{3a} and give C the fee simple at law? If a use upon a use may be treated as an enforceable trust, why should not the Statute execute it now that there is an interest recognised in equity, though not at law? In the absence of explanation the immunity of C's interest is not only a flagrant evasion of the Statute but lacks even plausible legal justification.

The gist of the explanation given by Lord Nottingham lies in two cardinal points. First, there is a difference in substance between a use and a trust; they are not different names for the same thing. This point is developed later. The second position taken is that the Statute of Uses was not intended to apply and did not apply to all uses and trusts but only to such equitable interests as fell within the operation of an earlier Act of 1483 (1 Ric. 3, c. 1), which gave certain beneficiaries to whose use lands were held a power to convey the legal estate. This Act provided that alienations of the legal estate by a *cestui que use* should be good against himself and his heirs and also against anyone with a title or interest in the property *only to the use of the cestui que use* and his heirs at the time of alienation. It was only in such cases, runs the argument reported by Lord Nottingham, namely, where the beneficiary, the *cestui que use*, had a power to convey the legal estate so as to bind his feoffees to uses under the Act of 1483, that the Statute of Uses in 1535 gave

² 1 Atk. at 591.

³ Sugden in Gilbert on *Uses*, 3rd ed., pp. 348-350n., has some pertinent remarks.

^{3a} Here B takes at common law and not under the statute according to the accepted authorities. See Cheshire, *Modern Real Property*, 7th ed., p. 56.

the *cestui que use* the legal estate by executing the use in his favour, *i.e.*, made him owner at law instead of only equipping him with a power to make an effective disposition of the legal estate. For the purpose of this argument, therefore, equitable interests must be distinguished into two categories: (i) those affected by the Act of 1483, which after the Statute of Uses are executed by the Statute and where the beneficiary becomes legal owner; (ii) those not affected by the Act of 1483, which therefore are not executed by the Statute of Uses and which the Chancellor is therefore free to protect as ordinary equitable interests under his exclusive jurisdiction if he so chooses. In exercising this discretion he creates a general equitable jurisdiction over trusts, equitable interests of a character quite different from the uses affected by the Act of 1483 and executed by the Statute of Uses.

This interpretation of the Statute of Uses is restrictive because the earlier Act applied only to certain uses and the Statute of Uses speaks comprehensively of trusts as well as uses. It is also seemingly artificial because it will be seen to depend in important instances on a distinction between the nature of uses and of trusts. Nevertheless, unfamiliar as such propositions may be, this interpretation has the merit of offering some precise legal justification for the results of judicial policy.

THE BACKGROUND

The Statute of Uses was designed to cut away the disadvantages, to purchasers of land generally and to the royal revenue in particular, which flowed from the separation of seisin and beneficial interest in land subject to a use. It did this by uniting seisin and beneficial interest in the *cestui que use* and in large measure it succeeded. By executing the use as a legal estate the Statute threw a great body of real property law into the common law courts, which in course of time digested the use and turned it into a legal interest of some flexibility and complexity. The Statute too had a radical effect upon the contents of the conveyancer's precedent book. The statutory settlement had confirmed the bargain and sale as a valid mode of conveyance but had added the requirement of enrolment. The Statute of Enrolments (27 Hen. 8, c. 16), however, dealt only with the execution of uses of freehold, and it is common knowledge that the use of leaseholds in conveyancing enabled secret conveyancing to come back into general practice. Because of the publicity of enrolment the bargain and sale of freehold lost favour and was generally superseded. Similarly there was a decline in the popularity of the covenant to stand seised. Originally a somewhat formless mode of conveyance, it became

during the latter part of the sixteenth century to a great extent formalised.⁴ In Coke's day it still had a certain following, but certain inherent limitations led to its disuse.⁵ Feoffments, fines and recoveries continued as regular and common forms of conveyance, but these too had a strong element of publicity.

Conveyancing by means of terms of years came into use in a form which dexterously took the advantage of one statute and avoided the other. The device of a lease and release in a bargain and sale is traditionally attributed to Sir Francis Moore and seems to have come into general use in the early part of the seventeenth century. The device worked in a double-barrelled fashion. The lease evaded the requirement of enrolment and the possession was transmuted and vested in the lessee by virtue of the Statute of Uses. This statutory possession, though it would not support an action for trespass,⁶ was enough to entitle the lessee, the purchaser, to receive a release of the reversion without actual entry on the land or the necessity to attorn. The lease operated under the Statute; the release operated at common law.

This is elementary knowledge; but it is unfortunately not elementary knowledge what course of conveyancing practice gave birth to the passive Chancery trust. As Professor Plucknett has pointed out,⁷ there is the further difficulty that the few fragments of information stand out in deceptive isolation and invite generalisations upon cases that are possibly exceptional.

Undoubtedly one of the more significant events in conveyancing practice after the Statute of Uses is the attempt to mount uses on a conveyance by bargain and sale. Such an attempt was considered in *Jane Tyrrel's Case* in 1557.⁸ It was established law before the Statute that a use limited on a lease reserving rent was invalid. So too, after the Statute, there is the same notion that a feoffee cannot be seised to conflicting uses. As in the case of the lease the duty to pay rent⁹ was inconsistent with the express use, so in a bargain and sale it was thought impossible, on the

⁴ *Callard v. Callard* (1597) Moore 687, Cro.Eliz. 344, where it seems to have been held by the Exchequer Chamber that the intent to raise a use in this way must be declared by deed.

⁵ It was unsuited for family needs. Particularly because the consideration was necessarily of blood or marriage, no use could be raised in favour of a stranger, nor indeed could a power be executed in his favour.

⁶ *Lutwich v. Mitton* (1621) Cro.Jac.604. The three heads of the common law courts, sitting in the Court of Wards, would not allow this point to be argued, so axiomatic did they consider it.

⁷ *Concise History*, 5th ed., 599.

⁸ Dyer 155a.

⁹ Or even more generally there were doubts based on the duty towards the reversioner raised by tenure: Brooke, *Feoffment al Uses* 40 (1532), 47 (1538). Earlier law required the feoffee to have a fee simple: Plucknett, *Concise History*, 581.

score of repugnancy, that A should be able to bargain and sell to B to the use of C. The implied use raised by the bargain for money between A and B conflicted with the express use in favour of C.¹⁰ The Common Bench (sitting in the Court of Wards) considered themselves obliged in *Jane Tyrrel's Case* to disallow one of these uses and preferred to retain that which supported the conveyance. In favouring the implied use at the expense of the express one the decision is unambiguous; but the reason given in the report, seemingly by the reporter, Sir James Dyer C.J., is not happily expressed. It is said flatly that "a use cannot be engendered of a use." The notion that uses cannot depend on one another, but must each in turn derive their validity from the seisin upon which they are mounted, is accurate enough of the old law, and the rule of repugnancy is not without its logic (the use is only the right to take the profits), but Dyer's phrase was too picturesque not to be without its dangers.¹¹

It was many years before the Chancery felt either inclined or able to ignore the technical repugnancy. Decisions at the beginning of the seventeenth century show the Chancery following the common law closely in refusing to enforce a second use. The reason is expressly said to be "because the bargain and sale hath a consideration in itself; and such a consideration in an indenture of bargain and sale seemeth not to be examinable, except fraud is objected, because it is an estoppel."¹² The exception of fraud is significant, because much equity jurisdiction has its rise in relief against fraud and is then extended to other transactions of a similar kind that merit equitable adjustment.¹³

The general jurisdiction over trusts, nevertheless, had never

¹⁰ Powers of leasing could not, therefore, be effectively conferred through a bargain and sale.

¹¹ Suppose it was expressed in a bargain and sale that the purchase money was C's and paid by B only as his agent, and the habendum was then to B in fee to the use of C in fee. Where is the repugnancy here and why should not this use on a use be executed? But the courts do not appear to have considered such a case.

¹² *Anon.* Cary 14, S.C. Crompton, Courts, 54a. In *Holloway v. Pollard* (1605) Moore 761, Lord Ellesmere in Chancery was of opinion that "le bargainor que vient eins per l'use del fine ne poit estoyer seisie al aucun autre use car donques la serroit use sur use." For a reaffirmation of the common law view, see *Girland v. Sharp* (1595) Cro.Eliz. 382.

¹³ Thus Lord Nottingham reporting one of his cases in 1681 (Case Book, case 1098) says that he "was not willing to speak so plainly of this case as it deserved nor to brand a gentleman of quality (the defendant) with the terms of a fraudulent circumventor of his mother (the plaintiff). There is room enough for relief in this court by calling that which looks like a fraud by the more civil name of a trust, as we did in *Mildmay & Duckett's Case*, though when that case came before the Lords they called a spade a spade." In *Mildmay's Case* (case 822) he had "thought it the mildest part of the case to declare that all the deeds obtained by the defendant were in trust for the plaintiff. For else I should be obliged to set them all aside as being gained by a manifest fraud and circumvention."

been abolished. Many feoffees must have been entrusted with active duties, collection of rents, administration of property and so forth, and for these purposes the Statute had allowed them to retain their estates in the land. Moreover, all uses of copyhold were exempt, and, more important for their influence on legal development, all uses of leaseholds.¹⁴ Thus the profession never forgot the learning relating to uses, which accounts for the quick development of the rules governing the revived trust in Lord Nottingham's day and also accounts for many of the difficulties in formulating those rules.¹⁵

There have been several attempts to account for the revival of the passive trust. They are all as yet unproven. The most attractive view is that put forward by Professor Plucknett¹⁶ who supposes that the Chancellor was asked from time to time to rectify and relieve against conveyances whose draftsmen had forgotten the dangers of implied uses. Cases such as *Jane Tyrrel's Case* are attempts to persuade the court to set right a transaction in which the parties have been insufficiently or incorrectly advised.¹⁷ They are not attempts to break down an established rule of law. Few litigants in any age go to law to contest an established rule, for to do so is nearly always futile and invariably expensive. Law develops rather by the evasion of awkward rules than direct opposition. North C.J. in 1677 says significantly that "conveyances have been altered not so much by the knowledge of the learned as by the ignorance of unskilful men in their profession."¹⁸

Now Chancellors would listen sympathetically to applications for rectification or relief in deserving cases. As one early reporter says, "the Chancery also giveth help for the perfecting of things well meant and upon good consideration."¹⁹ There would, for instance, commonly be a decree for relief where there was a faulty trust to convey; this was an active trust and so outside the Statute. A characteristic case of active trusts is *Sir Moyle Finch's Case*²⁰ from which it may be inferred that a trust to pay debts mounted on a bargain and sale could be enforced in equity, though for certain reasons the trust to pay debts then under consideration could not be enforced. The trusts in this case, one to convey,

¹⁴ Where freehold land was given to A and his heirs to the use of B for 21 years, the use was executed and the case was not like that of an assignment of a term to A for the use of B for 21 years.

¹⁵ Particularly over doctrines of privity.

¹⁶ *Concise History*, 5th ed., 600 *et seq.*

¹⁷ A reliable precedent book like West's *Symbolography* gives, in Holdsworth's opinion (H.E.L., V, 307) a precedent of a trust imposed on a bargain and sale in a form which appears at least doubtful. 1615 & 1647 eds., s. 284.

¹⁸ 2 Mod. at 251.

¹⁹ Cary 16.

²⁰ (1600) 4 Inst. 86.

the other to pay debts, indicate both the limited scope of the jurisdiction and also promise for the future. Indeed the prevalence in Lord Nottingham's reports of trusts to pay debts suggests that they may have represented an important part of the course of conveyancing practice behind the revival of trusts. The influence of such a jurisdiction now begins to appear when there has been a manifest mistake in settling property to the use of beneficiaries. Such a case is *Sambach v. Dalston* in 1634 where the court relieved against a mistake similar to that in *Jane Tyrrel's Case*.²¹ But this is still far from the passive trust with a settled division of the legal from the equitable ownership. In 1634 the receipts in the Court of Wards were rising steeply²² and the judges could not consistently with their duty countenance a general divergence of seisin and beneficial interest.

Nevertheless the borderline between an active and a passive

²¹ Tothill, 188, gives the decision in a single brief sentence. The decretal orders give a fuller story. Reg.Lib. 1634/5, B f. 47: on October 14 the case was put to the court. John Price, former husband of the plaintiff, Margery Sambach, intending to convey his lands to the use of himself in tail and in default of issue to the plaintiff Margery in tail with other remainders over, "a feoffment was to that purpose by him made to the defendant and one Richard Willis, since deceased, by the words in the habendum whereof the estate is limited to the said defendant and the said Willis and their heirs to the use of them, their heirs and assigns, for ever to the several uses hereafter mentioned, viz., to the use of the said John Price and the heirs of his body and for default of such issue to the use of the plaintiff Margery and the heirs of her body with other remainders over. By which mistake in regard that in law one use cannot be raised out of another use the estate in law now resteth in the defendant. And therefore the plaintiffs have exhibited their bill to compel the defendant to convey the said lands to the use of the plaintiff Margery in tail with the remainders over . . ." The defendant admitted he did not claim to his own use. Reg.Lib. 1634/5, B f. 93: on November 12 the Queen's Solicitor appeared to argue against an order nisi that the defendant should convey to the use of Margery in tail with remainders over. He conceded the defendant did not claim except "to and upon such trusts as in the deed of feoffment under the name of uses are expressed" but he urged that the proposed conveyance would prejudice an infant remainderman because Margery would be enabled to discontinue and grant an entail to her second husband. If the uses had been properly limited she would have been prevented by 11 Hen. 7, c. 20 from discontinuing the entail and the intention of the donor to benefit his kindred by remainders was clear. The case was postponed for a full hearing which came on next May: Reg.Lib. 1634/5, B f. 585. The plaintiffs insisted that it was intended that Margery should have an estate in tail and alleged "that the limitation in the said deed of trust to the use of the said trustees and their heirs for ever was inserted only through the ignorance of the scrivener that drew the conveyance . . ." The defendant contended that the words were there "by the providence of John Price to bar the plaintiff Margery from doing any act to prejudice the estate of those who are in the remainder . . ." After much argument which is minuted in the decretal order, it was ordered that Margery should enjoy the property during her life and on death it should devolve on her issue, if any, (which was unlikely, as she had married twice in the last twenty years, and had none), Sambach to be entitled as tenant by the curtesy if issue were born and predeceased her, and that the defendant should execute such a conveyance approved by Hutton J., care being taken that Margery should have no power to cut off the entail and thus prejudice the remainderman.

²² Bell, *Court of Wards and Liveries*, Appendix II, Table A.

trust must often have been difficult to discern. Then there is the readiness of equity to construe the right to call for a conveyance as entitling the beneficiary in equity as if the conveyance had been made. Where there is such a right either under an express trust or because equity is prepared in the circumstances to enforce a conveyance, this position, as Professor Plucknett points out,²³ "only needs a slight change of emphasis to become equitable ownership, thus growing imperceptibly into a passive trust." Such a development is a natural one and one that is agreeable to ordinary principles of equity. Unfortunately the printed reports tell us practically nothing of the details of this development.²⁴ All that is certainly known is that a general jurisdiction over trusts was established by the eighteenth century. The moral justification for enforcing all lawful trusts is clear and is thus put by Ames.²⁵ "The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the Chancellor at length compelled the faithless legal owner to perform his agreement." But to allow a gift to A and his heirs to the use of B and his heirs to the use of (or in trust for) C and his heirs to have the desired effect needed something more than an appeal to natural justice. Legal reasons were required for evading the Statute by so obvious a device as adding a few words to a conveyance to act as a kind of shock-absorber against the Statute. Some such reasons are set out by Lord Nottingham in a treatise entitled a *Prolegomena of Equity*,²⁶ the text of which is given in the next section.

LORD NOTTINGHAM'S STATEMENT

In his *Prolegomena of Equity* Lord Nottingham starts his chapter on Trusts by stating that some lawyers thought the trust "to be only a use at second hand," but that in his opinion "a trust is and always was a thing quite different from a use." "Otherwise," he says, "there could be no such thing as a trust now,²⁷ for the Statute [of] 27 Hen. 8 doth in express words declare that where any person is seised to the use, trust or confidence of another, possession shall go according, etc. And therefore if a trust at this

²³ *Concise History*, 5th ed., 602.

²⁴ *Ash v. Gallen* (1668) 1 Chan.Cas. 114, has interesting arguments between counsel, but the parties inconsiderately compromised.

²⁵ *Lectures in Legal History*, 247.

²⁶ A copy of this work has recently come to light and been acquired by the Law Library of Congress. From internal evidence it seems to have been written mostly in 1674-1675.

²⁷ He is speaking generally without adverting to such exceptions as leaseholds.

day did not differ from such trusts or confidences as are mentioned in the statute of 27 Hen. 8, it would follow that all trusts now would be executed as uses, and so there could be no such thing left as a mere trust." He then states that the following distinction has been taken. "The statute of 27 Hen. 8 is intended only of such trusts and confidences by virtue of which the *cestui que trust* had power to dispose of the land by 1 Ric. 3,²⁸ which indeed is all one with a use; for the mischief after 1 Ric. 3 was that he who had a conveyance from *cestui que use* was not sure of his title, because there might be a secret conveyance from the feoffees to uses; and therefore 27 Hen. 8 did execute the use, etc. But where the trust was of such a nature that *cestui que trust* could not dispose of the land by 1 Ric. 3, there was no such mischief, and therefore no such trust was executed."

Pausing here, it may be noticed that this interpretation emphasises one object of the Henrician legislation, namely, the protection of purchasers. Bacon in his *Reading on the Statute of Uses*²⁹ speaks of this object as one of the most important, but he points out that the Statute had additional objects, as the preamble clearly says. The argument is certainly selective.

Lord Nottingham continues: "The first kind of trust ever was and still is a mere use only. 'Tis now turned to an estate in law, which before the statute was merely an equity. The latter kind of trust remains still as it was at common law, viz., an equitable interest in the land, which enables no man to use or enjoy the possession or profits of the land without the help of a court of conscience by way of subpoena. And therefore some have said that, if before the statute of 27 Hen. 8 a man had enfeoffed A and B to the use of them, C and D and their heirs in trust that the feoffor should receive the profits,³⁰ this trust built upon a use would not have been executed by the statute, no more than it is at this day; for such a trustee could not have disposed of the land within 1 Ric. 3, because 1 Ric. 3 makes good the conveyance

²⁸ This is the Act of 1483 referred to in the first section. Though it gave to certain beneficiaries a power to convey the legal estate, it left untouched the power of the feoffees themselves to convey, and thus purchasers were still in great danger of unknown dispositions of the legal estate, let alone possible collusion between *cestui que use* and his feoffees. The Act was not repealed till 1863 when it had long been of no effect.

²⁹ Works, ed. Spedding, VII, 421. See *Chudleigh's Case*, 1 Co.Rep. 113b, 123. In this case the language of some of the judges shows the close connection between the two Acts; *per* C.B. and Walmesley J. at 132, and *per* Gawdy J. at 135.

³⁰ I take this to mean a limitation to A and B to the use of A, B, C and D and their heirs in trust for the settlor. In a case in 1678 (case 780) Lord Nottingham reports a settlement, seemingly before 1654, by the late Lord Chandos who had suffered a recovery "to the use of himself and Dudley Rowse and their heirs in trust for the Lord Chandos and his heirs."

of *cestui que use* against all persons claiming only to his use, which reaches not the case of them who claim to their own use but in trust for another. So again, if a feoffment be made to the use of A for life, and after his death that B shall take the profits, this is a use in B; but if it be said that feoffees shall take the profits and deliver them over to B, this is not [an] use in B but [a] trust, for B cannot take the profits unless by the hands of feoffees."³¹

It will be enough to complete Lord Nottingham's statement with a few further examples he sets down. "A feoffment to A and his heirs in trust that B and his heirs shall take the profits is a use in B and executed by the statute notwithstanding the word *trust*. Otherwise it was if the profits had been wholly limited to B but only for life or perhaps in tail,³² for then it had vested as a trust. Otherwise it would be if a bargain and sale were made to A and his heirs in trust that B and his heirs should take the profits, for a use on a use cannot be, and therefore this must be a trust. But a feoffment to A and his heirs to the use of A and his heirs in trust that B and his heirs shall take the profits is a use executed, for the first use is idle to A, being no more than the law speaks."³³

³¹ A good example of the narrow line between active and passive trusts. Lord Nottingham here cites Brooke, *Feoffment al Uses*, 52, on which this last example is based.

³² On the question how far the equitable owner of an estate less fee simple could alienate so as to bind his feoffees, it may be pertinent to state in simplified form the principal rules. The equitable owner in tail if he conveyed by lease and release or feoffment or recovery could only bind the feoffees during his life by virtue of the Act of 1483. Lord Nottingham in 1681 (case 1117) said that a recovery suffered by such a beneficiary did not bind his feoffees longer than his life for the reason they were not seised solely to his use. A fine levied by such a beneficiary did bar his feoffees from entering after his death, but this was not because of the Act of 1483, but because their estate was dispossessed by virtue of 4 & 5 Hen. 7, c. 24, on Fines. As for the equitable tenant for life, his alienation of the fee passed only an interest determinable on his death, because when he died the feoffees claimed to the use of the remaindermen and the alienation could not bar their entry, which was a common law right not affected by the Act.

³³ This sentence indicates that Lord Nottingham would not have allowed a gift unto and to the use of A in fee to the use of B in fee the effect later attributed to it. His opinion is clearly logical. However, it was eventually laid down in *Doe v. Passingham* (1827) 6 B. & C. 305, that in a gift to A and his heirs to the use of A and his heirs in trust for B and his heirs, the use to A is executed in him at common law and the Statute does not move against B's interest. Earlier Sir Edward Sugden in his work on *Powers*, 4th ed. at p. 129, had argued learnedly that "if the estate vests in A by the common law . . . it is clear that the statute would execute the use limited to B; for, independently of the statute, A cannot take a legal estate under a conveyance upon which the statute would not operate if uses were declared of it." An instructive case on this question is *Tipping v. Cosins* (1695) Comberbatch 312, Carth. 272, where the estate was limited in a fine to the use of trustees and their heirs during the life of the settlor on trust to allow him to take the profits. Serjeant Wright argued that the settlor was vested with the legal estate by the Statute, because the trustees were in at common law, "as where

COMMENT

It will have been seen that this explanation largely turns on confining the operation of the Statute of Uses to those forms of limitation which would have enabled the *cestui que use* to alienate the legal estate under the Act of 1483. To put it another way, the Statute of Uses only created an estate at law in the beneficiary where a power existed antecedently by virtue of the earlier statute. The effect is not unlike that of modern real property legislation which has shifted the basis of conveyancing by tenant for life from powers to estates.³⁴ The equation of the scope of the two Acts is an exercise not free from complexity, but it may be useful to look at the equation in three particular respects.

1. Neither statute applied to leasehold uses or trusts. It is in this connection that Sir Edward Sugden³⁵ remarks briefly on this argument and says that exemption of leaseholds from the Statute of Uses derives justification on this ground. It should be noted too that the exemption of leaseholds can be rigorously deduced from the statutory requirement of seisin before the Statute could transmute possession.

2. The Act of 1483 did not apply except to uses where feoffees were seised only to the use of their *cestui que use*. This had to be related to the dogma about a use on a use. Thus when Lord Nottingham gives his example of a bargain and sale to A and his heirs in trust for B and his heirs, it is evident that the land is not held solely to the use of B but rather the settlor has declared conflicting uses, of which the latter is void as a use on the ground of repugnancy. There is, in short, no use in B's favour and so the Act of 1483 cannot apply. Again, in his first example of a trust built upon a use, it is clear that the reason why it was said that the Statute of Uses did not apply is because the Act of 1483 did not apply in the circumstances.

3. The exemption of active trusts from the operation of the Statute of Uses would at first sight seem to make equation difficult, because the reason commonly given for their exemption is that it was necessary for the feoffees to retain the legal estate in order to perform their positive duties. This reason could hardly apply

a man makes a feoffment to certain trustees and their heirs to the use of them and their heirs in trust for J.S., this trust is executed," but the court decided that the trustees took under the Statute, "because the limitation of the use is different from the estate of the land. . . ."

³⁴ Another Act of Richard 3, c. 5, provides an interesting statutory precedent. This Act vested seisin in any *cestui que use* in respect of whose land the King, when Duke of Gloucester, had been solely seised to uses. At common law the King could not be seised to uses, because, says Lord Nottingham in his *Prolegomena*, "he is a body politic and is not compellable by subpoena."

³⁵ Gilbert on *Uses*, 3rd ed., p. 69.

before the Statute because there was then no question of divesting the feoffees of their interest; the Act of 1483 only conferred an additional power. The solution is probably to be found by considering the example given by Lord Nottingham of a feoffment to the use of A for life with the direction that after his death the feoffees should take the profits and deliver them to B. This is to be considered, says Lord Nottingham, not as a use but as a trust in favour of B, "for B cannot take the profits unless by the hands of feoffees." The Act of 1483 applied to uses and not to trusts. What was the difference? As Lord Nottingham said initially "a trust is and always was a thing quite different from a use." It is true that in the eighteenth century some very eminent judges could say that trusts were only uses reappeared under a new name, but they were concerned with problems of applying principles of the old use to the new trust. This assimilation tended to hide the fundamental difference which in truth divided uses from trusts. Let us take the case of a feoffment in fee by which seisin is transferred to the feoffees and a confidence or trust placed in them to allow the feoffor and his heirs to receive the rent and profits. We have seen earlier in the course of examples given by Lord Nottingham that this confidence or trust is a use. The reason is because the feoffees have a permanent estate in fee in the land subject to the use, the use being nothing more than the liberty to enjoy the profits, that is, the right of the *cestui que use* to take the profits for himself. A trust, on the other hand, does not make this division of property into use and seisin; rather it meant that the grantor had conveyed the lands then and there transferring both the possession and use to the grantee but upon the special trust and confidence that he would hold both to answer some fiduciary duty. The presence of a discretionary power would, of course, have the same effect as an active duty in the grantee; it would make him a trustee.³⁶ Therefore, says Bacon in his *Reading on the Statute of Uses*, if a man had enfeoffed another to the intent or in trust to be re-enfeoffed, or to the intent to be vouched, or to the intent to suffer a recovery, none of these intents, or active trusts, was a use.³⁷

The reasoning behind Lord Nottingham's explanation naturally suggests many questions. On the technical repugnancy of a use on a use, which objection remained as valid as on the day *Jane Tyrrel's Case* was decided, Lord Nottingham seems to have felt that this was a technicality of uses bred in courts of common law

³⁶ There are many difficult cases of interpretation where active and passive duties are run together. *e.g.*, a trust to pay rent to A or to permit him to take the rents. See Maitland, *Equity*, 38-39.

³⁷ See generally Sanders on *Uses*, 5th ed., pp. 2-4, for the above paragraph.

and one over which a Chancellor with a jurisdiction over trusts should not vex himself unduly. In his reports he is content to note under the title of a case in 1677³⁸ that "if a use be limited upon a use, though the second use be not good in law nor executed by the statute, yet it amounts to a declaration of trust and may be executed in Chancery." By 1700 it can be stated confidently in an equity abridgement³⁹ that there are three ways of walking outside the Statute. 1. Where a man seised in fee raises a term for years and limits it in trust for A, etc. (trustee not seised). 2. Where lands are limited to the use of A in trust to permit B to receive the rents and profits (use on a use). 3. Where lands are limited to trustees to receive and pay over the rents and profits (active trust). It will be seen that these three methods correspond with the three numbered paragraphs set out above. Of these, though it is far from being the whole story, the use on the use is perhaps the most remarkable episode. Is it not only juggling with words to call the second use a trust and even dishonest to invoke an old Act dealing with uses to explain why the Statute of Uses should not execute the so-called trust? Probably Lord Nottingham would have answered our question by giving some such example as a feoffment to A in fee to the use of B in fee to the use of C in fee, and pointing out that the Statute executes the legal estate in B and that B now holds to his own use. The limitation to C cannot be a use, because that would be inconsistent with B's use; it is a trust because seisin and use are united in B subject to a fiduciary duty to C. The Statute of Uses does not move against the trust because it is liable to a restrictive interpretation as already explained.

It is evident that the practical reasons allowing the revival of equitable estates at this time was the changed attitude of the judiciary. In earlier days long terms of years in trust were consistently discouraged by the judges and laboured under the suspicion

³⁸ Case 487. Reg.Lib. 1675/6, A f. 881, gives the complicated facts of this bill for a partition. The plaintiff claimed under a deed enrolled in 1651 with fine and recovery from one Thomas Gwillim. The defendant denied the plaintiff's title because Thomas Gwillim "did by indenture dated the 18th day of May in the 17th year of King Charles the first convey [the land] to Thomas Caple, Esq., . . . Edward Andrews and their heirs . . . to hold for the use or in trust for the use of himself Thomas Gwillim and Mabel his wife for their lives and after their decease to Thomas Gwillim the younger, his son, and heirs male of his body, and for want thereof to the right heirs of Thomas Gwillim the elder . . ." The defendant said he was heir male and that Thomas the elder, being only tenant for life, had no power to convey to the plaintiff. After delays over trying the defendant's title by Ejectment the court decided in view of the defendant's conduct to take the issue as found against him, and just under a year from the first hearing a commission was awarded to make partition. Reg.Lib. 1676/7, A ff. 431, 552.

³⁹ Eq.Cas.Ab. 383.

of frauds upon the feudal revenues of the Crown.⁴⁰ It is certain that the abolition of the incidents of military tenure in 1660⁴¹ removed many judicial scruples. An example may be taken from Lord Nottingham's reports. In 1677⁴² the question came before him whether lands held *in capite* and devised to a charitable use could pass entirely by way of appointment under the Act of Elizabeth, 43 Eliz. c. 4, although the Statute of Wills⁴³ avoided generally devises of such land for a third part. Judges earlier in the century had been clearly against exempting charities in this way from the operation of the Statute of Wills. "Nevertheless," says Lord Nottingham, "it seems that all these resolutions were strained by the judges for the advancement of the King's profit and prerogative in wardships and primer seisins. For ever since [military] tenures were abolished⁴⁴ the judges have conceived themselves at more liberty to speak plainly in this matter and have held that devises of *capite* lands (though made before the dissolution of the Court of Wards, and in a time when the testator had reason to believe the law to be that his will could operate but upon two parts) are good for the whole as an appointment within 43 Eliz." He then cited a Chancery precedent of 1671 for the modern practice. "And with this resolution I now concurred."

If the Statute of Wills were to be thus freshly approached, there is no reason to suppose that the lawyers of Lord Nottingham's day approached the Statute of Uses in a very different temper of mind. The evasion of the Statute could not now be attended by the horrid consequences which the preamble argued flowed from separation of seisin and beneficial interest. Practically the only danger was the extreme informality of the trust, that is, it could be created and assigned by parol. But as Lord Nottingham was writing his account of trusts, the Statute of Frauds, in the drafting of which he had a great share, had already started its long journey to the Statute-book and this Act introduced formalities in the creation and assignment of trusts.⁴⁵

⁴⁰ In *Cotton's Case* (1612) Godbolt 191 the Courts of Wards decreed the infant heir of an assignee of a lease to be in ward. This revolutionary attempt to attach incidents of freehold tenure to a leasehold was not repeated, though it was the decision of Coke C.J. and Tanfield C.B.

⁴¹ 12 Car. 2, c. 24. The Act in fact regularised a situation that had existed from February 24, 1645.

⁴² Case 714.

⁴³ 32 Hen. 8, c. 1.

⁴⁴ It would have been more accurate to say that all freehold tenures (except frankalmoin) were turned into socage. The Act in section 1 does in terms take away and discharge tenures by knight service, etc., and then enacts that all tenures are to be turned into free and common socage. Challis, *Real Property*, 23, has some extreme strictures on the drafting.

⁴⁵ 29 Car. 2, c. 3, ss. 7, 9.

The object of these pages has been to present Lord Nottingham's explanation to the reader rather than to attempt to prove the validity of that explanation. A detailed commentary on the Act of 1483 and the learning of the old use would soon take us to depths below depths⁴⁶ and it seems more prudent merely to say that the explanation has something of the air of an *ex post facto* rationalisation. We should not, however, discount it on that ground for much of the common law has been made or modified along these lines; and why not equity? We may part from the problem with a final restatement of the argument as reported by Lord Nottingham. A statute of 1483 enabled certain equitable owners to convey the legal estate. Where such a power existed, the Statute of Uses executed the equitable interest. Where the power did not exist, the Statute did not execute the equitable interest. Whether this statement is capable to strict proof up to Lord Nottingham's day is uncertain; but I may express the same hope as Lord Holt in *Coggs v. Bernard* that "however that happen, I have stirred these points which wiser heads in time may settle."

⁴⁶ Anyone who wishes to see the appalling difficulties that arose may consult *Delamere's Case* (1567) Plowden 346. These difficulties explain some differences of wording between the two statutes. The draftsmen of the first section of the Statute of Uses, for example, were careful to speak of seisin "to the use, confidence or trust of any other person or persons," and not to speak of seisin "to the use only of other persons," for as Bacon remarks in his *Reading on the Statute of Uses*, "they had experience what doubt the word 'only' bred upon the statute of 1 Ric. III." Bacon also thought the second section of the Statute of Uses was strictly superfluous and introduced from a desire to avoid the word.

RECENT DEVELOPMENTS IN THE CY-PRÈS DOCTRINE

J. C. HALL

THE law relating to charitable trusts is sadly technical and proverbially obscure. It has failed, it is said, to keep abreast of social developments and has thus attracted widespread criticism.

In 1950 the Prime Minister appointed a Committee under the chairmanship of Lord Nathan "to consider and report on the changes in the law . . . relating to charitable trusts in England and Wales which would be necessary to enable the maximum benefit to the community to be derived from them." In 1952 the Committee reported.¹ Several aspects of the law had engaged their attention but the outstanding problem in their view was the narrowness of the *cy-près* doctrine.² "There can be no doubt," they declared, "that the need for some relaxation of the *cy-près* doctrine, so long pressed, is extensive and has now become urgent."³ Furthermore, it was clear from the evidence of the Senior Chancery judge⁴ that this view commands judicial support.

Legislation to relax the *cy-près* doctrine was recommended but no measure has yet been laid before Parliament. It is of some interest, therefore, to examine the attitude of the courts to this problem during the last few years and to consider how far reform is being achieved by purely judicial process.

The *cy-près* doctrine was after all the creature of the courts, and as their own child it remains still their own responsibility. The child was born out of the more liberal spirit which once prevailed in the courts of this country. Due in part, no doubt, to the fact that an ecclesiastic presided, the Court of Chancery from the start did what it could to foster charity and to protect and preserve gifts to it. Not only did it permit property devoted to charity to be tied up for ever, but it provided new purposes for a trust as near as possible (*cy-près*) to the original if they were or became incapable of execution. "If the substantial intention is charity," concluded Lord Eldon in 1802 after reviewing the old authorities, "the law will substitute another mode of devoting the

¹ Cmd. 8710.

² p. 30.

³ p. 27.

⁴ Vaisey J., quoted at p. 280.

property to charitable purposes, though the formal intention as to the mode cannot be accomplished.”⁵ Such generous treatment was not, of course, accorded to non-charitable trusts. But with charities the position was different: the donor’s intention, so the Ordinary had maintained, was to benefit his soul by charitable works, and thus to allow the gift to be defeated because of the failure of a particular object of charity would have been to disappoint the intention.⁶ The intention was, very properly, allowed to prevail, and the *cy-près* doctrine resulted.

That so liberal a rule should have been suffered to remain untrammelled in its passage down the centuries would be a little remarkable. In fact at the close of the eighteenth century the fetters were applied. *Cy-près* was not to be invoked, it was said, unless there was manifested a “general charitable intention”; if there was merely an intention to benefit a particular charitable purpose it stood excluded. This distinction was repeatedly made during the nineteenth century but was never completely accepted. It is significant, for example, that in his *Law of Charitable Bequests* which appeared in 1888, Dr. Tyssen took the robust view that it was “settled law that property once devoted to charity is so devoted for ever, and on failure of the primary object, the property will be applied to some other charitable purpose.”⁷ Likewise, former editions of Tudor on *Charities*⁸ stated that “if a perpetual trust is created for a particular charitable purpose which takes effect in the first instance, no subsequent failure of the purpose will defeat the trust, and it is immaterial in this case whether there was, or was not, initially, any charitable intention beyond the accomplishment of the particular purpose.”

But the requirement of a “general charitable intention” had, nevertheless, taken a firm hold in the courts. In 1913 it was enunciated by Parker J. in *Re Wilson*⁹ in these terms: “where it is possible, taking the will as a whole, to say that notwithstanding the form of the gift the paramount intention according to the true construction of the will is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intention of the donor as to the manner in which the general gift is to be carried into effect,”—then only will the *cy-près* doctrine be allowed to operate. This language has been repeatedly quoted in subsequent cases.

⁵ *Moggridge v. Thackwell* (1802) 7 Ves. 36 at p. 69.

⁶ Tudor on *Charities* (5th ed.), p. 142.

⁷ See 2nd ed., p. 184.

⁸ e.g., 4th ed. (1906), ch. IV, s. 1 (c).

⁹ [1913] 1 Ch. 314 at p. 320.

It is not surprising, therefore, that the Nathan Committee made the gloomy assumption that a "general charitable intention" is a pre-requisite of the doctrine. The current editions of Tudor, Tyssen, Hanbury and Keeton all say the same.¹⁰

Yet the battle is by no means lost and the reformers need not yet assume that Parliament can be their only source of comfort.

In the first place it must be asked what exactly is meant by the requirement of a "general charitable intention." No rules can be discovered in the authorities as to what will be held sufficient *indicia* of such intention, and the present editors of Tudor admit that the notion "is hardly susceptible of accurate definition."¹¹ How then is one to discover, if discover one must, whether the donor was merely endeavouring to "graft on" (in Parker J.'s language) a particular desire to a general gift to charity, or whether he intended a gift for a particular charitable purpose alone?

Not altogether surprisingly the reported cases show a remarkable vacillation between a strict and a liberal interpretation of the so-called rule. Indeed, Parker J. himself confessed in *Re Wilson* that in deciding whether the "general charitable intention" existed, "different minds may very well take different views."¹²

Lord Eldon was clearly impatient with the requirement and would have reduced it to something approaching a fiction. In *Mills v. Farmer*¹³ he observed that "the question is not so much what was the intention as what, in the contemplation of law, must be presumed to have been the intention." If that indeed is the question one wonders why it need be asked at all.

Would the courts be prepared then to overthrow the requirement of a "general charitable intention" for the operation of the *cy-près* doctrine? The requirement was unknown at the outset¹⁴ and though it appeared towards the end of the eighteenth century it was not generally accepted until the close of the nineteenth. Its meaning is obscure, its application extremely difficult, and it stands in the way apparently of "the maximum benefit to the community" being derived from charitable trusts.¹⁵

¹⁰ Tudor on *Charities*, 5th ed., p. 141 (one exception is admitted), Tyssen's *Law of Charitable Bequests*, 2nd ed., p. 184, Hanbury's *Equity*, 6th ed., p. 242, Keeton's *Law of Trusts*, 6th ed., p. 166.

¹¹ p. 145.

¹² *Supra*, at p. 322.

¹³ (1815) 1 Mer. 55.
¹⁴ See, for example, *Da Costa v. De Pas* (1754) Amb. 228: Elias de Pas left £1,200 for establishing a Jesuba or assembly for reading the law and instructing the people in the Jewish religion. It was held that the bequest was not good in law and the money was given not to the next-of-kin but to a Foundling Hospital for supporting a preacher and instructing the children in the Christian religion.

¹⁵ This must be one inference from the Nathan Committee's desire for a relaxation of the rules of the doctrine.

It is submitted that with one exception recent decisions show that the courts are fast moving towards its abandonment or at least its modification. In the last five years there appear to have been eight relevant cases.

The first is *Re Wokingham Fire Brigade Trusts*.¹⁶ A local fire brigade sold its fire engines to the National Fire Service and was disbanded. What was to happen to the funds which had been voluntarily subscribed? Danckwerts J. considered that the subscribers had no intention as to the future disposal of their money. "The funds were subscribed out-and-out for a charitable purpose. Though that purpose is no longer practicable by reason of the sale of the assets to a different body charged with the duties, the charitable trusts do not fail. It is not necessary to consider whether there was any general charitable intention and the trusts should be modified by means of a *cy-près* application."¹⁷ Thus the rule found no favour with Danckwerts J.

The Lynmouth flood disaster led to another *cy-près* problem.¹⁸ Over a million pounds was donated in response to the Lord-Lieutenants' appeal for help. There was a surplus of a quarter of a million. Having decided first that this was a valid charitable trust, Wynn-Parry J. had to consider whether the surplus should be applied *cy-près*. He quoted the well-known passage from Parker J.'s judgment in *Re Wilson*¹⁹ and remarked unhappily that whereas in that case Parker J. had to apply his test to a single will, he (Wynn-Parry J.) had "to discover the intention of many hundreds—it may be thousands—of donors." This was clearly a virtual impossibility and the learned judge contented himself by following the decision in the rather similar case of *Re Welsh Hospital (Netley) Fund*.²⁰ There P. O. Lawrence J. had remarked that "it is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him. . . . To draw such an inference would be absurd on the face of it"; similarly, the individual subscribers of substantial amounts must have "intended to part with their contributions out-and-out . . . and did not intend that the surplus, if any, of their contributions should be returned to them." Wynn-Parry J. felt that this reasoning must apply equally to the case before him and so after claiming that he had discovered a general charitable intention, he ordered that

¹⁶ [1951] Ch. 373.

¹⁷ p. 377.

¹⁸ *Re North Devon and West Somerset Relief Fund Trusts* [1953] 1 W.L.R. 1260.

¹⁹ *Supra*.

²⁰ [1921] 1 Ch. 655.

the surplus be applied *cy-près*. In fact he made no attempt to inquire, in accordance with Parker J.'s stipulation, whether each donor had wished to "graft on" to a general gift a direction as to his desire as to the manner in which the general gift was to be carried into effect, or whether it was merely a gift for a particular purpose. It was as well that he did not; for the opinion is hazarded (and by one who himself contributed) that the gift was in most cases for a particular purpose and thus did not bear the "general charitable intention" postulated by Parker J. At the same time the money was certainly given out-and-out, and few would have objected to the surplus being applied *cy-près*. It was unfortunate, therefore, that Wynn-Parry J. could only reach what was clearly the right decision by paying lip-service to an unnecessary and misleading rule.

Bolder was the approach of Harman J. in *Re British School of Egyptian Archaeology*.²¹ The School, which was an educational charity, was being wound up and Harman J. held that the funds should be applied *cy-près*. With rather more perspicacity than Wynn-Parry J. in the *Lynmouth* case he said²² "I am told that if the court decides that a subscriber did not intend to have his money back in any event, he must be taken to have had a general charitable intent. I am not sure that the two things are synonymous. I do not think that follows. I think that a man may well say 'I parted with my money to this society: I do not reserve any right to have it back' without having any positive intention that it shall go to an analogous society. . . . In my judgment all that is necessary is that the inference to be drawn shall be that a subscriber, or donor, or testator cannot be supposed to have expected, or to have impliedly contracted, to have his money back." This, with respect, is a far more satisfactory approach—to ask, in effect, whether the donor would have expected his money back, rather than whether he had a "general charitable intention" in Parker J.'s sense.

Next came the important case of *Re Hillier's Trusts*.²³ In 1938 an appeal had been launched for funds to build a voluntary hospital at Slough. Some £50,000 was received from individual donors and from the holding of concerts, whist drives and church collections. But first the war and then the National Health Service Act, 1946, made the building of the hospital impracticable. What was to be done with the money? Upjohn J. at first instance held that the donations of the individual subscribers must be returned, because

²¹ [1954] 1 W.L.R. 546.

²² p. 553.

²³ [1954] 1 W.L.R. 700.

in view of the terms of the brochure which had invited their subscriptions, their intention must have been to contribute to the erection of a voluntary hospital only. The Court of Appeal (Lord Evershed M.R. and Denning L.J., Romer L.J. dissenting) reversed him and ordered that the money be applied *cy-près*. Lord Evershed M.R. admittedly took as his "guide" the familiar language of Parker J. in *Re Wilson*,²⁴ and decided that there was here a "general charitable intention" in the sense of a general intention to provide a hospital at Slough; for it was not of the essence of the donors' gifts, he considered, that it should be a *voluntary* hospital. In reaching this decision he was influenced by the fact that those at any rate who contributed to church collections and the like "must be taken to have intended to part, out-and-out, with their money in any event."²⁵ Where then the circumstances affecting the presumed intention of a donor are equivocal, as they were here in the case of each individual subscriber, "it is a relevant and admissible fact in determining his true intention that when he contributed to the fund he must be taken to have known that his contribution would be mingled with those of others who . . . were contributing in circumstances which negated any right or expectation on their part to any return of their money in any circumstances." For this, after all, was a single appeal and "where there are many sources of contribution to a charitable fund then all the contributors should, in the absence of special circumstances, be taken to contribute on terms common to all."²⁶ Only if an individual could come forward and prove that his donation was made exclusively for the purpose of erecting a voluntary hospital should he receive back the money he had given.

Denning L.J. put the matter on a somewhat broader basis. When a person gives money at a church collection, flag day, whist drive or dance he gives his money "beyond recall." So both if there is a surplus, or if the charity fails altogether, it need not be returned. "They all gave their money without reserve; and no reserve will be imputed to them. It is useless to ask what was their intention; for a situation has arisen which they did not contemplate, and for which they did not provide. They had formed no relevant intention. So the law must provide. The law must say what is to happen to the money. It does it by making presumptions in favour of charity. It presumes that those who gave the money would wish that [it] should be devoted to a charitable purpose as near as may be to the original purpose." If a donor had been

²⁴ *Supra*.

²⁵ p. 711.

²⁶ p. 713.

asked what was to happen to the money if the named purpose became impossible of fulfillment he would have replied "If that should happen I will expect you to use it for some other good cause but I will not expect it back."²⁷ And should the donors of large sums by cheque or deed of covenant be treated any differently? No, said Denning L.J., "I do not myself think that the donors of large sums would wish to get their money back when those who give the small sums do not. Those who give of their abundance are just as charitably minded as the poor widows who give their mites; and all should be treated alike."²⁸ Apart from "exceptional cases where the donor makes it clear that if the main purpose should become impossible, he will want his money back . . . the law will, I think, make in every case a presumption in favour of charity."²⁹

The wisdom of this view was surely demonstrated by the fact that in spite of numerous newspaper advertisements by the trustees inviting donors to claim their money back, not a single person had come forward to do so.

So, by a majority, the Court of Appeal ordered that the trust funds be applied *cy-près* with, in the case of Denning L.J., no regard, and in the case of Evershed M.R. only scant regard to the so-called requirement of a "general charitable intention." The question rather was "would the donors have expected their money back?" with a presumption that they would not.

This decision was followed in the very similar circumstances of *Re Dover's Battle of Britain Memorial Hospital Fund*.³⁰ The building of the Memorial Hospital had become impracticable, and as the terms of the appeal which had resulted in subscriptions were in some degree equivocal, Upjohn J. made the assumption (in accordance with *Re Hillier*) that all the contributors must have contributed on terms common to all. Many had contributed anonymously, and so all the funds were applied *cy-près*.

No mention was made of *Re Hillier* in *Re Raine, decd.*³¹ but even so the trend, if one may say so, was the same. The testatrix had bequeathed the whole of her residuary estate "for the continuation of the seating" in a parish church. There was a substantial surplus and Vaisey J. held that it should be applied *cy-près*. He referred to the requirement of a "general charitable intention" and admitted that "as a general proposition [it] is well founded and well established."³² But, he continued, "somewhat different

²⁷ p. 715.

²⁸ p. 715.

²⁹ p. 716.

³⁰ *The Times*, June 29, 1955.

³¹ [1956] Ch. 417.

³² p. 421.

considerations arise where the charitable gift itself is residuary.” He referred to two earlier decisions³³ and concluded that “where a testator has shown an intention to use the whole of a residue, or the remaining portion of a residue, for a charitable purpose it is not necessary to do more than to find . . . an intention to part with the whole subject-matter of the residuary gift for a charitable purpose. It is not necessary to find a general charitable intention in the wider sense.” His decision was, therefore, another distinct blow at the so-called requirement.

An interesting example of a donor expressing a clear intention that his gift to charity was not absolute but was only for a limited time and for a limited purpose, occurred in *Re Cooper's Conveyance Trusts*.³⁴ Land was given to an orphanage in 1864 with a gift over for a non-charitable purpose if the orphanage should ever close. After some ninety years the orphanage was forced to do so. The gift over was clearly void as infringing the rule against perpetuities and the question for decision was whether the property should be applied *cy-près* or held on a resulting trust for the donor's estate. Upjohn J. summarised the law thus; “if one finds an initial out-and-out or perpetual gift to charity, albeit to a particular charity or to a particular charitable purpose, and that charity or charitable purpose fails after the gift has vested in interest, it is in a sense irrelevant to consider whether there is a general charitable intention.”³⁵ This is because the donor has made initially an out-and-out gift to charity, although to a particular charity or charitable purpose, and has reserved no interest in himself. . . . Where, however, the donor uses language showing an intention that in some circumstances he contemplates a failure of the purpose or indicates that his gift is only to be for a limited time or purpose, then it becomes a question of construction whether he made an out-and-out or perpetual gift to charity or not, and that is not inaptly expressed by asking whether he has evinced a general charitable intention. Whatever language is used, however, the whole question is what are the donor's intentions, to be ascertained on a true construction of the relevant documents in the light of the relevant surrounding circumstances.”³⁶

If there had been no gift over on failure of the orphanage the funds would have been applied *cy-près*. But in fact the donor had “evinced the clearest possible intention” that the property was to be used for non-charitable purposes if the particular charity failed.

³³ *Re King* [1923] 1 Ch. 243; *Re Roger* [1940] 1 Ch. 514.

³⁴ [1956] 1 W.L.R. 1096.

³⁵ This is the exception recognised by Tudor on *Charities*, 5th ed., p. 141.

³⁶ p. 1103.

There was, therefore, a resulting trust. The decision is perfectly consistent with Denning L.J.'s propositions in *Re Hillier*.

Thus far the trend towards a freer interpretation of the *cy-près* doctrine has been consistently maintained. But the trend was unhappily reversed in the most recent case of all—*Re Ulverston and District New Hospital Building Trusts*.³⁷ Once again an appeal for funds for a new hospital had led to subscriptions by individual donors (some anonymous) and the holding of whist drives and other entertainments for the purpose; once again no hospital could be built with the money. But the Court of Appeal (Lord Evershed M.R., Jenkins L.J. and Hodson L.J.) affirming the Chancery Court of Lancaster, held that the donors, so far as they could be identified, were entitled to a return of their money.

Jenkins L.J. delivered the leading judgment and Hodson L.J. expressed agreement with it. He assumed from the outset that the *cy-près* doctrine could not apply in the absence of a "general charitable intention." Further, he had no hesitation in regarding money given for building a new hospital at Ulverston as being given "for that sole and exclusive purpose and nothing else."³⁸ Not even anonymous contributors should necessarily be regarded as parting with their money out-and-out,³⁹ and Jenkins L.J. confessed that he failed "to see why a person who had put £5 into the [collecting] box and could prove to the satisfaction of the court that he had done so, should not be entitled to have his money back in the event of the failure of the sole and exclusive charitable purpose for which his donation was solicited and made." And even if the anonymous donor did give his money out-and-out "it might well be held that in the event which happened the anonymous contributor had simply abandoned his contribution so that it became *bona vacantia* on the failure of the purpose for which it was contributed."⁴⁰

Even more vigorous was his personal rejection of the reasoning that *prima facie* all contributors should be taken to have contributed

³⁷ [1956] Ch. 622.

³⁸ p. 632.

³⁹ Yet P. O. Lawrence J. had described such a suggestion as "absurd on the face of it" in *Re Welsh Hospital (Netley) Fund*, *supra*.

⁴⁰ p. 633. Cf. Dr. L. A. Sheridan writing in (1954) 32 *Canadian Bar Review* 599, who considers that money put in collecting boxes and the like can never be *bona vacantia* as "it must be forever impressed with a charitable trust" and "trusts do not fail for want of a trustee" (p. 621). (Surely, however, the equitable interest could become *bona vacantia*.) His discussion of the *cy-près* doctrine (or of the two *cy-près* doctrines as he maintains) is valuable. But he concludes that a general charitable intention, *semble* in Parker J.'s strict sense (see p. 622) is necessary except in the "out-and-out" cases. His division of the doctrine into two does not, with respect, seem justified or desirable. It is one doctrine and should follow one principle—intention or presumed intention.

on terms common to all. "Speaking for myself I entirely fail to see why the imputation of a general charitable intention to anonymous contributors (if rightly made) should afford any ground for imputing a general charitable intention to subscribers who give their names." Admittedly this reasoning was used by P.O. Lawrence J. in *Re Welsh Hospital (Netley) Fund*,⁴¹ but that case was concerned with the disposal of a surplus, not as here with a total failure *ab initio*, and that, said Jenkins L.J. "makes a material difference."⁴² *Re Hillier's Trusts*, however, was also concerned with an initial failure, but Jenkins L.J. considered that it nevertheless differed in other important respects from the present case. It was clear, he said, that the avowed objects of the fund in *Hillier's* case "were such as to afford grounds wholly absent in the present case for imputing to subscribers a general charitable intention."⁴³ Lord Evershed M.R.'s proposition that the intention of the anonymous contributors should be taken into account was confined to cases (such as *Hillier's*) where the intention of the named donors was in doubt. Here there was no such doubt.

Jenkins L.J. paused merely for a brief reference to the broad principles formulated by Denning L.J. in *Re Hillier*. "The judgment of Denning L.J. goes a great deal further than that of Evershed M.R. and if I may venture to say so with the greatest respect, I think it goes further than was necessary for the decision of the case; and in view of the strictly limited use made by Evershed M.R. of the factor of anonymous contribution and the dissenting judgment of Romer L.J., I cannot regard it as representing the opinion of the court."⁴⁴ This is of course true, but one would respectfully have preferred Denning L.J.'s important judgment to have been dealt with on its merits.

Lord Evershed M.R. expressed his agreement with the judgment of Jenkins L.J. and added that he thought it right that he should reconsider the language of his judgment in *Re Hillier*. It was only because the language of the brochure issued in the public appeal in that case was equivocal that he had considered it legitimate to assist its construction and effect by taking into account the fact that contributions were also being sought from anonymous donors. Lord Evershed M.R. also pointed out that "in the *Hillier* case it was a vital fact that there was no existing hospital at Slough at all," whereas "in the present case there was an old-established voluntary hospital at Ulverston and the object of the appeal was, as we

⁴¹ [1921] 1 Ch. 655.

⁴² p. 636. With respect, it is not clear why the difference should be material.

⁴³ p. 639.

⁴⁴ p. 641.

conclude, to provide a similar new and enlarged hospital to take the place of the old.”⁴⁵ This was therefore an appeal for a single and particular purpose, which had failed.

Those who have studied the Report of the Nathan Committee will read the *Ulverston* case with disappointment. When by general consent the need for relaxation of the rules of the *cy-près* doctrine is urgent, a decision of the Court of Appeal which enforces the most stringent interpretation of those rules can only be regarded, one would respectfully have thought, as a decidedly retrograde step. Disappointment is the more acute when one observes that the seven other reported cases of the last five years have been at one in loosening the bonds of *cy-près*, and in particular those bonds which shackled it to the requirement of a “general charitable intention.”

What value this obscure rule ever had is problematical. It is certainly quite useless today to ask if the donor meant “to graft on to the general gift a direction as to the . . . manner in which the general gift is to be carried into effect.”⁴⁶ If the rule means anything today it must mean merely this: that trust funds must not be applied *cy-près* unless the donor would have so wished. That indeed is reasonable until one recognises the fact that the donor’s wishes in this respect are almost invariably unascertainable, or at best the subject of surmise.⁴⁷ The problem then can only be resolved, as Lord Eldon himself observed,⁴⁸ in the form of a presumption one way or the other, rebuttable by clear evidence the other way. Which way then is the presumption to be? In favour of the donor or in favour of charity? It seems clear that until the *Ulverston* case the general trend of judicial opinion over the last five years had been towards the latter. The culmination was reached when Denning L.J. declared in *Re Hillier* that there should be a presumption of charity in all cases unless there is clear evidence that the donor would have expected his money back. Such a rule one feels would have met with the enthusiastic approval of the Nathan Committee.

It is to be hoped that the House of Lords may soon be invited to end the confusion now reigning by removing for all time Parker J.’s nebulous and artificial requirement of a general intention of charity and expressly approving Denning L.J.’s presumption of charity. If we have to wait for legislation to do this we may wait for ever. Let the courts act boldly to improve the functioning of their own creation, the *cy-près* doctrine, and rescue it from the disrepute into which it has unnecessarily fallen.

⁴⁵ p. 643.

⁴⁶ *Per* Parker J. in *Re Wilson*, *supra*.

⁴⁷ As witness the divergence of judicial opinion in *Re Hillier*, *supra*.

⁴⁸ In *Mills v. Farmer*, *supra*.

BOOK REVIEWS

Readings and Moots at the Inns of Court in the Fifteenth Century.

Volume 1. Edited by SAMUEL E. THORNE, Professor of Legal History and Librarian in the Law School of Yale University.

Volume 71 of the Publications of the Selden Society. [London: Bernard Quaritch, for the Selden Society, 1954. viii and 620 and (tables and indexes) 35 pp. 78s. 6d. net.]

THIS volume contains a transcript and translation of five readings or lectures delivered at the Inns of Court during the second half of the fifteenth century, together with portions from eleven earlier readings. For reasons of space the introductory comment has been restricted to a discussion of the identity of the five readers and the dates of the readings. We are, however, promised an account of late medieval legal education in Volume II, which will contain the texts of moot cases argued at Gray's Inn and the Inner Temple.

Readings formed the basis of the education provided by the Inns for its students in the late Middle Ages. Apart from such exceptional periods as the outbreak of plague, there were two readings each year, in Lent and autumn, at each of the four Inns. They were delivered systematically as regards the choice both of reader and of subject-matter. The duty to read fell upon each member of the Inn who had been called to the Bar. It is not clear how soon after call he might expect to have to give his first reading, but having given it he would be required to read again about six years later. Call to the degree of serjeant at law might entail a third reading. Considerable difference in quality might be expected between a first and a second or third reading, but this was probably not the case. The readings had to be on the "old" statutes, those prior to Edward III, which were taken in a fairly regular order of rotation to secure a proper course of tuition to any given student. Any individual preference of the reader being excluded save in the case of third readers, the readings became stereotyped and impersonal. Any differences in quality would emerge mainly in additions which the reader might choose to make and in any discussion which might ensue.

The readings are not the less important for that; they formed the core of learning on which the young student was brought up and which he would hear again and perhaps again during his sojourn in the Inn.

The five readings given here in full deal with the Statutes of Merton, cc. 1-4, Gloucester, cc. 1-3, and Westminster II, cc. 1-6 and 25. There is thus material not only on the entail, but also on

the rights and remedies of infants, wives and tenants in dower, on the receipt of reversioners, the efficiency of novel disseisin, the penalties for redisseisin and post-disseisin, and on advowsons, voucher, warranties, avowry and rights of common. The legal historian of the fifteenth century will find all this material interesting and occasionally amusing; he may smile at the rule that advances to a daughter must be brought into "hoggepot" (p. cxxviii) and may sympathise with the reader's direction: "Stude lez reazonz quar il est laboryouse descrier" (p. 10). If he is ever to fill the gaps in Maitland's account of the beatitude of seisin, then he must not overlook the readings on novel disseisin.

But it is Robert Constable's reading on De Donis at Lincoln's Inn in 1489 which is probably of the widest interest. This reading was delivered shortly before the Act of 4 Hen. 7, c. 24, of fines, but it does contain a discussion of 1 Ric. 3, c. 7, which was merely re-enacted by Henry VII (as in other cases).

Barring of entails is the matter which comes to mind most readily in this respect, and, as we should expect, we find the common recovery quite clearly in operation at this date (p. 184). No fresh light is thrown on double voucher, but some of the material does touch upon two aspects of the voucher *by* the tenant in tail which are not usually considered. First, what was the technical justification for allowing the tenant in tail to vouch a complete stranger? If one is tempted to suppose that the fiction had its origin in fact, then the only person whom the tenant could truly vouch was the donor—the least likely person to assist in the development of the fiction. Perhaps the key is provided on p. 196, where the voucher of a stranger is described as "by reason of a release with warranty, etc." Secondly, how was the court able to maintain that the rights of the issue and persons entitled on failure of issue were enforceable against the land which was to be provided by the vouchee? If the vouchee did present land, how could formedon be brought in respect thereof? Where was the "gift"? This was vital: on it depended the fiction that they had suffered no prejudice. To look upon the provision of land by the vouchee as the gift would have led to serious difficulties where the recovery had been suffered by a descendant of the original tenant in tail (p. 190). The solution was to devise an exceptionally complicated formedon, in which very little was traversable.

The question of barring apart, this same reading raises other curious points on entails. Constable delights in special tails and it is interesting to note that a gift to a man and a woman (who might be, but is not at the time his wife) and the heirs of their bodies creates a special tail, whether they marry or not, and therefore on the death of one the other becomes a tenant in tail after possibility (p. 173). A different solution is suggested, though no authority is cited, by a later reader at the Inns of Court (Cheshire, *Modern Real Property*, p. 175, but *cf.* Preston on *Estates*, ii, 422). The medieval

mind also delighted in the problems of a gift to a man and *two* women and the heirs of their bodies. Constable had an involved solution (p. 173; surely "son purpartie" in n.4 should be translated as "her part" rather than "his part"?) which is later avoided by Coke, who eliminates the second woman by invoking his beloved double possibility rule (Co.Litt. 25b).

The curious limitation "to A and the heirs of the body of his father" is also discussed (p. 178), and Constable, like Littleton (s. 30), clearly contemplates only the case where the donee is the sole issue of the ancestor. By Coke's time this restriction has disappeared and consequently he has a good deal of difficulty with the limitation (Co.Litt 26b; cf. Preston on *Estates*, ii, 385). The seemingly similar limitation "to A and *his* heirs of the body of his father" is interpreted very differently by Constable (p. 174), namely, as a valid gift "to A and his heirs," the rest being mere surplusage and void. It is unfortunate that Professor Thorne does not give full force to "*ses heirez*" in the translation, as Constable's point might be missed. It may be noted too that Challis (*Real Property*, p. 298) misreads Coke (Co.Litt. 27a), who does in fact give the same solution as Constable.

Clearly the material in this book presents great opportunities for comparison not only with Coke's treatment of the same problems, but also with Littleton's. Much of Constable's material is reminiscent of the Tenures (e.g., cf. p. 183 with Litt. s. 708), but much of the time Constable is merely repeating what has been a traditional reading and it would be interesting to know exactly what Littleton contributed in the way of form and material. Certainly he pruned a great deal.

It will be obvious that this book is not easy reading; it is extremely difficult reading. The Introduction is filled with closely reasoned arguments and the text itself is difficult even if it was intended for students. Professor Thorne has brought to the translation his great knowledge and deep understanding of medieval real property law and has expended immense labour on the identification of inadequate and misleading references. Nevertheless the material remains tough and one wishes that the editor had added more explanatory notes on the law itself. For example, a passage dealing with the abstruse doctrine of collateral warranties has been altered to refer to the *youngest* son, when the text speaks of the *eldest* son (p. 182). This has been done deliberately, and one feels that the editor has his reasons for doing so; but an explanatory note would have helped those of us less conversant with the subject. So too with a passage on the effect of a gift in tail to a bishop who had been a monk! (p. 171).

This must not be construed as criticism, but rather as a plea to Professor Thorne to have pity on lesser mortals in his ultimate study of the common law in the sixteenth century, a study of which

this work is but a preliminary by-product. That it is but this is a very great tribute to Professor Thorne's devotion to scholarship.

The volume being a publication of the Selden Society, it is hardly necessary for the reviewer to add that he has noticed virtually no slips, even with such difficult material. It may be of assistance to readers to note that on p. xxii, n.l., "Middle Temple" should read "Gray's Inn," and that the unidentified reference on p. 211 to 6 E.4 has been traced (not by this reviewer, he must confess) as probably Y.B.Hil. 6 Hen. 4, f.1, pl.6.

M. J. PRICHARD.

Calendar of the Caernarvonshire Quarter Sessions Records. Vol. 1, 1541-1558. Edited by W. OGWEN WILLIAMS. [Caernarvonshire Historical Society, 1956. xiv and 349 and (indexes 131 pp. 20s. net.)]

THE office of justice of the peace was introduced into the existing Welsh counties in 1536 as a preliminary step to the union of Wales with England, enacted later in the same year; this step, which marked "the formal end of castle administration" effected a virtual revolution in the administrative system of Wales. It is indeed fortunate that the extant records of Caernarvonshire Quarter Sessions should date from as early as 1541; no other Welsh county can boast of such records earlier than the seventeenth century.

Mr. Williams, who is the County Archivist, has made a start on the very laborious task of editing these records. This he has done by transcribing some documents and calendaring others. The bulk of the text consists of Sessions Files from 1546 to 1558. They include such documents as the writ summoning the sessions, indictments, jury panels, and writs for the appointment of constables. The Recognisance Rolls 1543-1544 and 1558 and Recognisance Books for 1544, 1552-1553 and 1555 have also been calendared. The Indictment Roll for 1541-1542 has been transcribed in full.

In his Introduction Mr. Williams has relied mainly on Lambard's *Eirenarcha* for his description of proceedings before the justices, but at the same time he has been able to make copious references to the text, which thereby serves as an excellent illustration that is earlier than any that the records of most English counties can provide. But the material published assists not merely in throwing light on the procedure of quarter sessions, but also on the political and social structure and special problems of the principality at a time when it was receiving a wholly alien institution. When dealing with this aspect of the matter in the Introduction, the editor draws not only on the records but also on a very wide range of historical writings. The result is a very readable account of the background to the work of the court.

The labour which has obviously been devoted to the text has been rivalled by that which has resulted in indexes filling 131 pages. The care and attention with which these have been compiled make them not the least important part of the book; they render the material accessible to the general historian and will be invaluable to the local genealogist. The Caernarvonshire Historical Society is to be warmly congratulated on this publication.

M. J. PRICHARD.

Juvenile Offenders before the Courts. By MAX GRÜNHUT. [London: Oxford University Press. 1956. vi, 140 and (index) 3 pp. 21s. net.]

THIS book contains the results of several years of empirical research carried out by Dr. Grünhut, with the help of a team of assistants. Throughout his inquiries Dr. Grünhut, who is Reader in Criminology in the University of Oxford, received the active support of the Home Office and the Oxford Social Studies Board. A research grant from public funds was made available under the provisions of the Criminal Justice Act, 1948, s. 77 (1) (b).

The inquiry had two main objects. The first was to assess the varying amount of crime committed by juvenile offenders throughout England and Wales. The second was to ascertain by statistical analysis how the methods of treatment varied from court to court in different localities and whether these variations reflected a genuine difference in the policy of the courts in those areas. The data, relating to juvenile delinquency, which form the basis of the report, were drawn from the annual volumes of *Criminal Statistics, England and Wales* and from the "Supplementary Statistics on Crime and Criminal Proceedings," issued by the Home Office. This information was supplemented by an analysis of the records of some seven hundred young offenders; the records were selected "to illustrate the work of juvenile courts under different conditions" in five police districts.

The author frankly admits that it is very difficult to ascertain the amount of crime committed by juveniles: in most areas it is extremely unlikely that all crimes committed by juveniles are in fact reported to the police; and further if crimes have been reported but not cleared up the age of the offender will frequently remain in doubt. Dr. Grünhut therefore bases his assessment on the number of juveniles found guilty of indictable offences at magistrates' courts in each of the one hundred and thirty-four police districts of England and Wales. An analysis is made according to sex and age in reference to the size of population in each area. The increase in crime since the second world war is discussed, and certain areas are singled out as having a high or low proportion of juvenile offenders found guilty of indictable crime. The rather detailed commentary

on the variations in the incidence of juvenile delinquency takes up the first fifty pages of the report and a number of the conclusions reached are not entirely unexpected. It is stated that the rise in the number of juveniles brought before the courts probably indicates that there was a considerable increase in juvenile crime during the immediate post-war period, and that areas with a high proportion of young offenders are mostly large manufacturing towns or ports. It is perhaps worth mentioning that all areas with a low proportion of young offenders were rural, with the notable exception of the city of Cambridge.

It is unfortunate that in the second part of the report, which shows the extent to which the choice of treatment varied from area to area, the analysis had to be based on figures classified under police districts rather than upon those for separate juvenile courts. As a consequence of this the author is forced to rely on aggregate figures in those cases in which a single police authority covers several petty sessional divisions. But even so one studies the variations in treatment with some dismay: in a few areas the magistrates granted an absolute discharge in more than forty per cent. of the cases, whereas in others they did so in less than five per cent.; the imposition of fines varied from two to more than fifty per cent., and the making of probation orders from fifteen to almost eighty per cent. of the cases. The author in examining these fluctuations in the percentages points out that in certain areas in which absolute or conditional discharges have been less frequent, the police have been in the habit of cautioning juvenile offenders instead of charging them. The inference is that the numbers of those discharged are artificially kept low, since the police normally adopt this practice of cautioning only when a fairly trivial offence has been committed. Moreover, we are told that fine and probation frequently proved to be complementary to one another, so that the two characteristic patterns are "either preference for probation coupled with a sparing use of fines, or a sparing use of probation with ample resort to fines"; and that, where magistrates are dealing with a large number of offenders, "they are inclined to dispose of a considerable proportion of them by the expedient means of discharge or fine, while where they have only a moderate number of young offenders before them they feel in a better position to consider individualised constructive treatment and thus to order probation." Dr. Grünhut, however, emphasises that to focus attention exclusively on differences in the choice of treatment can be most misleading: in fact, four-fifths of the juvenile offenders were found to live in areas where the principal methods of treatment applied by the courts (absolute and conditional discharge, probation, fine and committal to an approved school) "differ little from the average standards for all districts."

The final section, which presents the results of his study of the seven hundred cases brought before the juvenile courts, contains a great deal of information which may be regarded as of considerable

interest and value. But it also exemplifies the very real difficulties in thus applying the comparative method to an interpretation of the policy of magistrates' courts in various parts of the country. The result of his follow-up study is summarised in three conclusions: that the policy of sending those offenders with an unfavourable family background to approved schools is justified by the results; that, in those districts in which a high proportion of young offenders are granted absolute or conditional discharges, there is reason to believe that a number of them "would fare much better under the constructive methods of probation"; and that at present there is no conclusive evidence to indicate what would be the best methods of treatment for coping with the more serious forms of juvenile delinquency.

This book supplies certain valuable information and raises a number of important questions, many of which inevitably remain unanswered; it offers a useful basis for discussion and is likely to be of interest to those magistrates who have the difficult task of selecting the most appropriate form of treatment for young offenders.

F. H. McCLINTOCK.

The English Legal System. By A. K. R. KIRALFY, PH.D., LL.M., of Gray's Inn, Barrister-at-Law, Reader in Law at King's College, London. Second edition. [London: Sweet & Maxwell, Ltd. 1956. xxv and 394 pp. and (index) 10 pp. 30s. net.]

THIS book is designed to give beginners their first view of English law and legal institutions and has been written confessedly with an eye on the scope of the Intermediate LL.B. Examination at London University. The form therefore appears to have been largely influenced by the requirements of the London syllabus, which seems well enough balanced, though for general purposes it may be doubted whether the latter part of the book is not too heavily loaded with a detailed account of procedure. As the author says in his preface to the first edition, this inclusion of procedure is a difficult problem, for the subject is not taught much at universities. So for many starting to read law the chapters on procedure where detail is prolific may be treated with a certain discrimination. The earlier parts of the book are more fundamentally important as a background to the study of English law; the details of practice may come later.

It has already been noticed in another journal (72 *Law Quarterly Review*, p. 133) that the dominant notes of the book are procedure and history, and the review cited is mainly directed to the former topic. As for the historical side Dr. Kiralfy has used his extensive knowledge of legal history to good effect. There is a considerable

amount of detail, but the historical emphasis may be justified by the importance of giving a notion of perspective. The author says rightly that "the most characteristic feature of English law is its continuous growth since medieval times." This continuity means going back a long way if the legal system is to be properly understood. For the application of the law in practice much less, indeed little history is required, but to claim learning in the law it is necessary not only to know the rules but to know how they came about and the purposes to which the principles have been put. The current question of the scope of the action in tort for the loss of a servant's services has involved some far-ranging researches into the old law.

The author's history is reliable and there are few points where dissent is invited. Occasionally there is a lapse of historical sense. Thus at p. 40, note (d) we are told that "the word 'trespass' was much abused in medieval times." The reason given is that the word had originally a wider currency than in the modern technical sense. On *Tresspass on the Case* Dr. Kiralfy is on home ground and his statement is admirably clear. He does, however, start with the controversial opening that "Tresspass began to throw off a new branch in the middle of the fourteenth century known as *Tresspass on the Case*." This is perhaps less objectionable than speaking, as one well-known textbook does, of *Tresspass* as the stock selected for grafting, but these arboreal metaphors tend to prejudge the very open question how far *Case* can be said to be derived from *Tresspass* or whether it might not well be derived independently. The author's attitude to *tresspass* as a word, which has been mentioned above, very probably has something to do with his conclusion. Elsewhere (p. 46) he states correctly that "the name 'trespass' was wide enough to cover almost any kind of wrong," but he does not on this account make the inference which some think leads naturally to the probability of a separate descent for writs of common trespass and writs of special trespass, which latter category comes to comprehend all actions on the case for a wrong. Dr. Kiralfy does in fact state this latter view at p. 47 very fairly but so succinctly as to make it hardly possible by reading the statement to appreciate the strength of the arguments behind it. Nevertheless it may be conceded that scholarly argument is out of place in this sort of book and simplification should be preferred where possible. Indeed it is in those parts where the exposition is comparatively unelaborate that the author is most effective. It may be that such passages as the pages on *Equity* (pp. 72-83) will prove more readable to the beginner than those portions where specialist knowledge has its peculiar temptations.

In conclusion, the prospective lawyer will be much assisted by this book, provided that he reads with discrimination in those parts where the detail lies thickest. Chapter 3, for example, on *Sources*

is altogether readable and happily presented. (At p. 108 the description of Fitzherbert as an author "in the time of Queen Elizabeth I" should be corrected.) Dr. Kiralfy's writing throughout is clear, and, if his style lacks fluency, the reader is not fatigued, on account of frequent divisions in the text. The book itself is well produced and undoubtedly in its present form has a long and useful life ahead of it.

DAVID YALE.

Essays on the Law of Evidence. By ZELMAN COWEN, of Gray's Inn and the Victorian Bar, Barrister-at-Law, Professor of Public Law in the University of Melbourne, and P. B. CARTER, of the Middle Temple, Barrister-at-Law, Fellow of Wadham College, Oxford. [London: Oxford University Press. 1956. xvi and 270 and (index) 8 pp. 35s. net.]

OF this collection of essays on various topics in the law of evidence the authors modestly say: "it is our optimistic hope that it may in some way supplement (and it is certainly not designed to do more) the treatment of the topics by the recognised authorities." In fact it does much more than this. The quotation from Maguire—that the student of evidence "is making a study of calculated and supposedly helpful obstructionism"—strikes at complacency and foreshadows the careful, scholarly and profoundly interesting analysis that follows. The essays deal with the Evidence Act, 1938; confessions; evidence procured through illegal searches; evidence of similar facts; the opinion rule; admissibility of criminal convictions in civil proceedings; unsworn statements by the accused; compellability and privileges; and quantum of proof.

The reviewer has found the re-examination of the rules of admissibility of evidence of similar facts, with its consideration of *Harrison-Owen*, *Hall*, *Harris*, *Straffen*, and *Robinson*, of particular value. The topic is indeed one of which, in the authors' words, "poverty of settled principles in the midst of plenty of conflicting authority has long been the most striking feature." It is remarkable, but understandable, that so many of the cases on this branch of the law of evidence relate to sexual offences which, in the minority of cases in which an accused pleads not guilty, are notoriously difficult of proof.

There has recently been far too much ado about nothing in relation to the appropriate direction to a jury on the quantum of proof in a criminal case. Not long ago, Lord Justice Parker, presiding over a Moot, had occasion to stress that the combined remarks of prosecuting counsel, defending counsel and the judge or recorder during the course of the trial, rarely left a reasonable jury in any doubt. But appeals have been based hopefully on the *ipsissima verba* of directions, and arguments as to the merits of the different

phrases in use have been vigorous if unprofitable. The authors say: "Words acquire meaning only by usage. The time-honoured phrase is 'proof beyond reasonable doubt.' The use of that phrase does not and should not involve an investigation of what is meant by reasonable. That might well confuse rather than assist the jury. But so too would an investigation of what is meant by satisfaction, by full and thorough satisfaction, by feeling sure, etc. The claim of the time-honoured phrase is not that it is more precise than all the others, but it is more likely to convey the desired meaning simply because it is the time-honoured phrase." With respect, the reviewer finds himself in the warmest agreement.

This is a collection of essays of the highest quality, some of which have already appeared in the *Reviews*, gathered together and presented in admirable form.

F. J. ODGERS.

A History of English Law. Volume I. By SIR WILLIAM HOLDSWORTH, O.M., K.C., D.C.L., HON.LL.D. Seventh edition, revised, under the general editorship of A. L. GOODHART, K.B.E., Q.C., D.C.L., LL.D., and H. G. HANBURY, D.C.L. With an Introductory Essay and Additions by S. B. CHRIMES, M.A., PH.D., Professor of History, University College, Cardiff. [London: Methuen & Co., Ltd. 1956. xlviii and (Introductory Essay) 77 and 689 and (index) 16 pp. 45s. net.]

No work on English legal history is better known than this account by Sir William Holdsworth of the history of our judicial system, an account which, as the general editors remark, remains unsurpassed. The work needs no introduction and the task of a reviewer is therefore straightforward. He must congratulate the general editors upon the idea of a revised edition, upon the plan adopted and upon the choice of Professor Chrimes to execute it.

This plan takes the form of an introductory essay by Professor Chrimes. It would have been impossible satisfactorily to incorporate the additions to our historical knowledge in the text itself. As it is, we now have within the compass of seventy-seven pages a clear, concise and balanced assessment of the contributions contained in a multitude of books and articles. The latter are to be found more often in historical than in legal journals and Professor Chrimes goes back far beyond the date of the last edition in his collection of this material. As a result the attention of the lawyer is drawn to a great many works which might otherwise escape him.

The reviewer would find it difficult to say which part of this introduction he found most enjoyable, for all of it is interesting. It was, perhaps, the first part, which deals with courts of local jurisdiction; but the account of the recent work done on the early

history of the Royal Courts is just as clear and well-balanced. For example, the rather controversial views of Professor Wilkinson on the origin of the Chancellor's equitable jurisdiction seem adequately considered, and this within the compass of three pages.

Professor Chrimes has, however, been mainly concerned to summarise, rather than to increase the recent additions to our knowledge. This is therefore not the appropriate place to comment on the material summarised. Suffice it to say that to one who is not an historian the work of summarising seems to have been done extremely well. It cannot be emphasised too much, however, that the first year student must be warned to read Holdsworth's text first and turn to the very advanced introduction afterwards. From this point of view it might have been better if the introduction had appeared at the end rather than the beginning of the book.

Alterations to Holdsworth's text have been limited to corrections in his statements of existing law and to the insertion of a few additional references. Some of these have been inserted in the text itself, but most are contained in a list of addenda and corrigenda. This avoids the necessity of interfering with the existing pagination—a very considerable advantage—but it is a pity that some asterisk or other mark has not been inserted in the text, as the alterations are quite important. Such marks will doubtless be added in private copies, but probably not in the library copies which students will use.

More serious is the disappearance of Holdsworth's own list of addenda and corrigenda. It was in this that he accumulated most of his alterations to the text, as each edition came out. By the time of his last edition this covered twelve pages and included serious changes. Perhaps it was intended that Professor Chrimes's essay should take its place; this seems doubtful, though, as the references to this list which Holdsworth occasionally inserted in the text have not been eliminated (*e.g.*, p. 437, n. 4). May one put in a plea that Holdsworth's *ipsissima verba* be restored in any future edition?

As this is *the* student's textbook on the history of the judicial system, attention should be drawn to some of the points (they are very, very few) which might mislead a student, though not the more senior reader. In Holdsworth's own text the following references need slight correction: on p. 279, n. 6, the statute should be 6 Henry 8, c. 6 not 6 Henry 3; on p. 400, n. 7, the regnal year is 2 Hy. 4 not 6; the reference on p. 407, n. 7, is misleading and the title given in *Gross, Sources and Literature*, 2019, is easier to trace; the printing has gone wrong on p. 243, line 7, but can be corrected by reference to an earlier edition. In the introductory essay, reference to the Caernarvonshire Quarter Sessions Records (which appeared after the publication of this work) should be added to notes 3 and 4 on p. 29*; a reference to the article by Professor Hargreaves in 68 L.Q.R. 481, might be added to the references given on p. 51*, n. 3; on p. 53*, line 23, the words "*or rather the Court of*

the Lord High Steward" in relation to trial by peers are misleading; on p. 58*, line 17, "Henry VIII's expedients" should be corrected to "Henry VII's expedients"; a note should be added to p. 60*, line 8, suggesting that "Justice Hales" is *probably* Sir Mathew Hale; and on p. 71*, lines 4 and 6, the word "bishop" should be in the plural. A reference to the article by Mr. Milsom in 1954 C.L.J. 105, might be added on p. xlviii to the addenda and corrigenda (to p. 445); and on the same p. xlviii (addendum to p. 640, n. 8), the statement that the equity jurisdiction of the Exchequer is now exercised by the Queen's Bench Division seems misleading.

These are mostly, of course, quite trivial printing slips and the reviewer hopes he will not seem ungracious in mentioning them. He does so only in the hope that readers will correct them, not only in their own copies, but—more important—in library copies. They do not detract in the slightest from the great merit of this very welcome volume. Both Professor Chrimes and the general editors have earned our gratitude.

M. J. PRICHARD.

The Transfer of Chattels in Private International Law. A comparative study. By G. A. ZAPHIRIOU, LL.M. [University of London, The Athlone Press. 1956. xx plus 227 pp. 30s. net.]

It is a pleasure to note that during a space of little more than a year two monographs have appeared which deal with one of the most intractable topics in the conflict of laws. While it is inevitable that the nature of the material must cause a certain amount of repetition and overlapping, each of these monographs retains its individual character, for the emphasis on particular topics and the method of approach differ, thus making the two monographs complementary to each other. Dr. Lalive in his work on the *Transfer of Chattels in the Conflict of Laws* (1955) applied Continental methods of systematic exposition and reasoning to a study of cases drawn from common law jurisdictions. Mr. Zaphiriou employs the analytical approach, while drawing frequently on Continental writings. The operation of these two methods can best be seen from the treatment of the decision in *Green v. van Buskirk* by the two authors. In an introductory chapter he deals lucidly with the distinctions in various legal systems between the contract to transfer and the actual transfer, a problem which is taken up again later on in the book (pp. 53–65). His analysis of the effect of art. 2279 of the French Civil Code is a little strained, inasmuch as the author holds that according to French law delivery of possession by a non-owner to an innocent purchaser is to be treated as a derivative transfer of title (p. 10). This manner of interpreting the French rule colours his ensuing discussion, whenever French law is involved (pp. 103, 110, 164). The

chapters on the relative merits of the *lex domicilii*, the *lex loci actus*, the *lex actus* and the *lex situs* and the respective application of these criteria in practice cover familiar ground, but the author does not attempt to examine in detail the development of these principles and the reasons in domestic law and in theory, which led to their adoption and subsequent rejection. These chapters serve, thus, as a convenient introduction to the second part of the book which deals with the application of the *lex situs*. Here the author makes his own contribution by discussing in turn, capacity to transfer formalities and the essential validity of the transfer, the effect of rescission, passing of the risk, transfers by non-owners, involuntary transfers, pledges, liens and the like, and priorities. In these cases, contractual and proprietary effects are interwoven and the author's special merit is that he has done much to elucidate the intricate problems which may arise. In particular the question of intention in connection with the transfer of property is given due prominence. His conclusion (p. 59) that the *lex situs* governs the intention to transfer but that, for the ascertainment of the intention to transfer, recourse must be had to the law governing the contract is interesting, but in having recourse to what may be only "lois supplétives" which are incorporated in the contract in the absence of a clear intention by the parties, the boundaries between contract and property, which the author himself strives to delineate are disturbed once again. The line of demarcation between contract and property is particularly blurred when questions of mistake, misrepresentation, fraud and illegality arise, and when quasi-contract may have to be called in aid to redress the balance between them. Rescission of a sale provides an interesting example, but in referring both rescission as well as its proprietary effects to the *lex situs*, the author fails to consider whether an incidental or preliminary question is involved. Conversely, an incidental question of a proprietary character is involved if according to the proper law of the contract risk passes when title passes. The chapter on transfer by non-owners is influenced by the view which the author takes of art. 2279 of the French Civil Code. While there is no doubt that the *lex situs* of the chattel at the time of the alleged transfer must determine whether title has passed, it may be questioned whether art. 2279 does not apply immediately to movables which are brought into France after having been transferred elsewhere by a non-owner, for that article is not concerned with a derivative acquisition of title. (See also p. 164.) The chapter on involuntary transfers contains some interesting observations on the neglected problem of acquisitive prescription in the conflict of laws; the treatment of measures of expropriation, on the other hand, is careful, but cursory. If the report of the proceedings in *De Borbon v. Westminster Bank* (1933) 49 T.L.R. 414, had been taken into account, the customary mistake of regarding the proceedings in [1935] 1 K.B. 140 as involving the direct application of foreign penal laws to property in England would

have been avoided. The observations on pledges, liens and "privileges" are informative and balanced, but the question, raised by the author, whether an English court would enforce a "privilege" claimed by an unpaid French seller on goods which were at the time of the sale in France and were then removed to England or would treat it as involving a matter of priorities, seems to involve not one but two problems. It has long been recognised that great difficulties arise when an object is removed from one country to another and when several, inconsistent dealings take place. The problem, as is well known, is whether security of title or security of transactions is to be the dominant consideration. The author examines not only well-known prototypical situations, but a number of instructive real and hypothetical cases of a more recondite nature. It is possible to disagree with some of his solutions; for instance it may be doubted whether the right, accorded to the owner by Swiss law to recover stolen property from a purchaser in market overt against payment of the purchase price will be enforced in England on those terms. Contrary to the author, it is believed that the right of the purchaser to withhold the object until he has received the value of the purchase price is not a quasi-contractual claim, but a defence in the nature of a right of retention and that even if it were of a quasi-contractual nature, the *lex situs* does not necessarily apply. The remainder of the book is concerned with the position of mortgagees and of vendors under a conditional sale and with *res in transitu*, with special regard to transfers by means of documents.

The author has produced a critical and informative survey of the problems of the conflict of laws which may arise out of a transfer of chattels and his solutions are always interesting. It is his particular merit to have probed widely and deeply into the region where contractual and proprietary aspects converge.

K. LIPSTEIN.

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1956-1957

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The year began with an overflowing crowd in the largest room in the Law Schools to hear M. Marc Ancel, a judge of the Cour de Cassation, give the Biennial Public Lecture of the Department of Criminal Science (arranged in conjunction with the University Law Society) on the subject of "Crime Passionnel." The following week Mr. R. E. Megarry, Q.C., gave a talk of great interest to potential barristers on "Law as taught and Law as practised." Later in the term Mr. R. P. Colinvaux, Editor of the *Law Reports* and *The Times* law reports, explained his work in a talk on "Law Reporting." To give the last talk of the term we were fortunate to be able to obtain Professor Arthur E. Sutherland of the Harvard Law School, who spoke on "Legal Problems of School Desegregation."

There were two talks in the Lent Term. The first was given by Sir Lionel Fox, the Chairman of the Prison Commission, on "Individualisation in the Treatment of Offenders." Miss Sybil Campbell, in "A day in the life of a Metropolitan Magistrate," gave us an account of her work as a magistrate at the Tower Bridge Court.

Two moots were held at Cambridge during the year. In the Michaelmas Term the Oxford University Law Society were our visitors for a Criminal Law Moot set by Mr. J. W. C. Turner; Lord Justice Parker came down to preside. Counsel for Cambridge were R. A. Wheeler (Selwyn) and the Junior Treasurer. M. Zander (Jesus) and the President sat on the bench with Lord Justice Parker. The decision went unanimously for Cambridge—purely on the merits of the case, of course.

Communications concerning articles and notes should be addressed to the Editor, Professor C. J. Hamson, Trinity College, Cambridge.

Books for review should be sent to the Cambridge Law Journal, Squire Law Library, The Old Schools, Cambridge.

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